Supreme Court, U.S.
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No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

THE WEST OF ENGLAND SHIP OWNERS
MUTUAL PROTECTION AND INDEMNITY ASSOCIATION
(Luxembourg),
Petitioner,

v.

STEPHEN A. MOREWITZ,
as administrator, etc.,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

JOSEPH M. ALLEN, JR.
JOHNSTONE, ADAMS, BAILEY,
GORDON & HARRIS, L.L.C.
Post Office Box 1988
Mobile, Alabama 36633
(334) 432-7682
Counsel of Record for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED FOR REVIEW

1. The Respondent sued in district court on a marine insurance policy seeking to collect proceeds allegedly due under the policy. Petitioner obtained an order under § 3 of the Federal Arbitration Act (9 U.S.C. §§ 1-16 (1970 & Supp. 1995)) staying the litigation pending arbitration as required by the contract sued on. Respondent refused to arbitrate and, as a result, his suit was dismissed. Respondent then appealed the dismissal. The Eleventh Circuit held that it had jurisdiction not only over the dismissal but also, contrary to holdings in the Fourth, Seventh and Tenth Circuits, the order entered under § 3 of the Act. The question thus presented is whether the Respondent, under § 16(b)(1) of the Act, was required to arbitrate his claim before obtaining appellate review of the stay order.

2. Whether Petitioner's failure to demand arbitration six years prior to the institution of this suit against it constitutes a waiver of its contractually guaranteed right to compel arbitration of a dispute arising under a maritime contract cognizable in admiralty.

3. Whether a federal district court exercising admiralty jurisdiction must apply the direct action statute of the state in which the court is situated (here, Alabama) as the procedure of the forum, rather than conducting a choice of law analysis pursuant to federal admiralty choice of law rules.

PARTIES

PETITIONERS:

The West of England Ship Owners Mutual Insurance Association (Luxembourg)

The West of England Ship Owners Insurance Services Limited

RESPONDENTS:

Mukhtar Ahmed
Gulzar Ahmed
Khatoon Ahmed
Zulfegar Ahmed
Iftikhar Ahmed
Ijoz Ahmed
George Marangos
Andreas Marangos
Akaterini Marangos
Georgia Marangos
Efran Alvardo Martinez
Efran Martinez
Priscilla Martinez
Denora Martinez
Jose Martinez
Danello Martinez
Jesus Ramos Mayorquin
Guillermina Mayorquin
Maria Mayorquin
Daniel Mayorquin
Jose Mayorquin
Stephen J. Morewitz
Christos Passalis
Zorka Passalis
Heleni Passalis
Panagiotis Passalis
Eleni Passalis
Constantinos Stamatis
Afrodite Stamatis
Athena Stamatis

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
PARTIES	ii
TABLE OF AUTHORITIES	vii
OPINIONS BELOW	1
STATEMENT OF BASIS FOR JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	1
Overview	1
Virginia Litigation	2
Alabama Litigation	3
REASONS FOR GRANTING THE WRIT	5
I. A CONFLICT AMONG THE CIRCUITS EXISTS WITH RESPECT TO WHETHER A PARTY WHOSE ACTION IS STAYED UNDER SECTION 3 OF THE ARBITRATION ACT MUST ARBITRATE ITS CLAIM BEFORE OBTAINING APPELLATE REVIEW OF THE ARBITRATION ORDER	5
A. The Question	6
B. The Eleventh Circuit Decision	10
C. The Conflict	11
II. A CONFLICT AMONG THE CIRCUITS EXISTS WITH RESPECT TO WHETHER A PARTY MAY WAIVE ITS CONTRACTUAL RIGHT TO COMPEL ARBITRATION BY FAILING TO MAKE A PRE-LITIGATION DEMAND TO ARBITRATE	17

TABLE OF CONTENTS—Continued

	Page
A. The Question	17
B. The Eleventh Circuit Decision	18
C. The Conflict	20
III. A CONFLICT AMONG THE CIRCUITS EXISTS WITH RESPECT TO WHETHER A FEDERAL DISTRICT COURT EXERCISING ADMIRALTY JURISDICTION MUST APPLY DIRECT ACTION STATUTES OF THE SATE IN WHICH THE COURT IS SITUATED WITHOUT REGARD TO FEDERAL ADMIRALTY CHOICE OF LAW RULES	24
A. The Question	24
B. The Eleventh Circuit Decision	25
C. The Conflict	26
CONCLUSION	30
APPENDIX	1a

TABLE OF AUTHORITIES

CASES

	Page
Adair Bus Sales, Inc. v. Bluebird Corporation, 25 F.3d 953 (10th Cir. 1994)	11, 12
Allied-Bruce Terminix Companies v. Dobson, 115 S.Ct. 834 (1995)	5, 7, 8, 23
American Casualty Co. v. L-J, Inc., 35 F.3d 133 (4th Cir. 1994)	15, 16
Collins v. American Automobile Ins. Co., 230 F.2d 416 (2nd Cir. 1956)	29
Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213 (1985)	7, 17
Erie Railroad v. Tompkins, 304 U.S. 64 (1938)	25, 28
Fleming v. Pan American Fire & Casualty, 495 F.2d 535 (5th Cir. 1974)	24, 26, 27
General Guaranty Ins. Co. v. New Orleans Gen. Agency, Inc., 427 F.2d 924 (5th Cir. 1970)	21, 22
Humphrey v. Prudential Sec. Inc., 4 F.3d 313 (4th Cir. 1993)	15, 16
Klaxon Co. v. Stentor Electric Mfg., 313 U.S. 487 (1941)	27, 28
Lauritzen v. Larsen, 345 U.S. 571 (1953)	25
Lubrizol Int'l v. M/V STOLT ARGOBAY, 562 F. Supp. 565 (S.D.N.Y. 1982)	21, 23
Macey v. Crum, 30 So. 2d 666 (Ala. 1947)	26
Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614 (1985)	9
Moses H. Cone Memorial Hosp. v. Mercury Constr., 460 U.S. 1 (1983)	17
National Foundation for Cancer Research v. A. G. Edwards & Sons, 821 F.2d 772 (D.C. Cir. 1987)	18
Perera v. Siegel Trading Co., 951 F.2d 780 (7th Cir. 1992)	12, 13
Rush v. Oppenheimer & Co., 779 F.2d 885 (2nd Cir. 1985)	17
Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974)	5, 6, 8, 20
Sedco, Inc. v. Petroleos Mexicanos Mexican Nat'l Oil, 767 F.2d 1140 (5th Cir. 1985)	19
Sibley v. Tandy Corp., 543 F.2d 540 (5th Cir. 1976), *cert. denied*, 434 U.S. 824 (1977)	17

TABLE OF AUTHORITIES—Continued

Page

Southside Internist Group v. Janus Capital Corp., 741 F. Supp. 1536 (N.D. Ala. 1990) 23
State Establishment for Agric. Prod. Trading v. M/V WESTERMUNDE, 838 F.2d 1576 (11th Cir.), *cert. denied*, 488 U.S. 916 (1988) 8, 10, 11, 12, 13
State Trading Corp. v. Assuranceforeningen Skuld, 921 F.2d 409 (2d Cir. 1990) 24, 25, 28, 29
Stedor v. Armtex, Inc., 947 F.2d 727 (4th Cir. 1991) 13, 14, 15, 16
Steelmet, Inc. v. Caribe Towing Corp., 779 F.2d 1485 (11th Cir. 1986) 28
Stifel, Nicholaus & Co., Inc. v. Freeman, 924 F.2d 157 (8th Cir. 1991) 22
Tenneco Resins, Inc. v. Davy Int'l AG, 770 F.2d 416 (5th Cir. 1985) 22
The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972) 20
Ultracashmere House, Ltd v. Meyer, 664 F.2d 1176 (11th Cir. 1981) 7
Vimar Seguros y Reaseguros v. Sky Reefer, 115 S.Ct. 2322 (1995) 9, 10, 20, 23
Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ., 489 U.S. (1989)..5, 7, 19
Wilburn Boat Co. v. Fireman's Fund, 348 U.S. 310 (1955) 26, 28

OTHER

H.R. Rep. No. 96, 68th Cong., 1st Sess. (1924)..... 5, 7

OPINIONS BELOW

The opinions of the Eleventh Circuit (App., *infra*, 1a-21a, 35a-46a) are reported at 62 F.3d 1356 and 896 F.2d 495. An opinion of the Eleventh Circuit and all opinions of the district court are unreported, but are set out in appendices B, C, D, E, and G.

STATEMENT OF BASIS FOR JURISDICTION

Petitioner seeks review of the order entered by the Eleventh Circuit Court of Appeals on September 6, 1995 in *Morewitz v. The West of England*. The jurisdiction of this Court to review that order on a writ of certiorari is conferred by 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

Sections 1-4 and 16 of the Federal Arbitration Act, sections 27-23-1 and 27-23-2 of the Code of Alabama (1975) and The British Third Parties (Rights Against Insurers) Act of 1930 are reproduced at App., *infra*, 80a-89a.

STATEMENT OF THE CASE

Overview

The Respondent in this action is the administrator of the estates of eleven foreign seamen who died when the IMBROS, a Cypriot flagged cargo vessel, sank in international waters on December 14, 1975. His predecessor administrator filed a wrongful death suit on behalf of their estates in the Eastern District of Virginia in 1976. Respondent obtained what was, essentially, a default judgment against General Development & Shipping Enterprises Co., Ltd. ("General Development"), the vessel's managing agent, on April 3, 1980 on behalf of seven of these estates. The judgment against it was not paid. No judgment was obtained against the ship's owner, Imbros Shipping Co., Ltd., or against Petitioner. Imbros Shipping was dismissed. Petitioner was never sued.

No action to collect the judgment against General Development was taken until 1985 when Respondent brought suit in the Southern District of Alabama against Petitioner,

The West of England Ship Owners Mutual Protection & Indemnity Association (Luxembourg) ("West of England") a Luxembourg corporation, seeking to collect that Virginia judgment. Alabama was selected because of the presumed reach of the Alabama "long-arm" statute. (App. G, 55a n.2). The theory of Respondent's Alabama suit was that the West of England had insured General Development as owner *pro hac vice* of the IMBROS under a protection and indemnity policy issued through Petitioner's agent in London, even though General Development was never a named assured. Significantly, this policy provided not only for the payment of funds to the only named insured, Imbros Shipping, under certain circumstances but also that (i) all disputes thereunder were to be resolved by arbitration in London and (ii) English law would apply to all such disputes.

The issue underlying this petition arises from the fact that the Respondent embraces the indemnity contract insofar as he might be entitled to money thereunder but disavows those portions of it which require arbitration in London and application of the laws of England. His contention, adopted by the Eleventh Circuit, is that the arbitration clause should not be placed on "the same footing" as the other provisions of the contract.

Virginia Litigation

Following the sinking of the IMBROS, Ruth Morewitz, then an attorney in Newport News, Virginia, obtained appointment as administrator of the estates of eleven deceased crew members of the IMBROS. She thereafter filed a maritime wrongful death action in the Eastern District of Virginia against numerous parties including Imbros Shipping Co., Ltd., the vessel's owner, and General Development, its managing agent. Imbros Shipping Co., Ltd., the owner, was dismissed for lack of personal jurisdiction. General Development, however, which acted as "agent for twenty or more vessels, many of which called in the Hampton Roads port on a regular basis," remained as a defendant. (App. I, 59a).

During the course of the litigation, General Development failed to respond to discovery. The court, on March 26, 1979, entered an Order which, after reciting General Development's defaults with respect to discovery, ruled that "[u]nder authority of Rule 37(d) . . . [f]or purposes of the trial in this matter General Development & Shipping Enterprises Co., Ltd. shall be considered as owner *pro hac vice* at the time of the loss." (App. J, 2). A Memorandum Opinion issued April 3, 1980 found liability on the part of General Development as owner *pro hac vice* of the IMBROS. (App. I, 59a). Damages were awarded on behalf of seven deceased crew members.

It is these Virginia awards, arising from a casualty in international waters which Respondent seeks to collect in Alabama from a Luxembourg corporation which was never a defendant in the Virginia suit. This suit is predicated on a protection and indemnity contract Petitioner issued in 1975 to Imbros Shipping, a Cypriot corporation over which personal jurisdiction was never obtained in Virginia and against which no judgment has ever been rendered.

Alabama Litigation

The Respondent's original complaint in the Southern District of Alabama against Petitioner was filed June 26, 1985, more than five years after judgment was entered against General Development. The only basis alleged for the suit was a British direct action statute known as The Third Parties (Rights Against Insurers) Act, 1930. The Respondent thereafter filed an amended complaint alleging that the action was based upon a policy or contract of marine insurance. Respondent also invoked the Alabama direct action statute. (App. M). Although referred to (incorrectly) as a "direct action statute," the Alabama statute is actually a statute providing for an action in aid of execution.

The district court dismissed for lack of subject matter jurisdiction. (App. G). The Eleventh Circuit reversed, holding that the allegation in the complaint that recovery

was sought on a marine policy was "enough to confer subject matter jurisdiction." (App. F, 41a).

After remand to the district court Petitioner filed a motion under § 3 of the Federal Arbitration Act (9 U.S.C. §§ 1-16 (1970 & Supp. 1955)) ("the Act") to stay the litigation pending arbitration in London as required by the contract. The court entered a stay order pursuant to § 3 of the Act on April 13, 1992 which the Respondent attempted to appeal. (App. E). The Eleventh Circuit dismissed the appeal because it had no jurisdiction to review the stay order under § 16(b)(1) of the Act which mandates that no appeal may be taken from an order staying litigation pursuant to § 3 of the Act. (App. D).

The district court then entered an order granting the Respondent 180 days in which to commence arbitration. (App. C). He refused do so. Petitioner thus moved for, and was granted, a dismissal because of the Respondent's failure to commence arbitration. (App. B). The Respondent appealed that order of dismissal and it was that appeal which resulted in the Eleventh Circuit decision of September 6, 1995 of which review is here sought. (App. A).

Petitioner contested the court's appellate jurisdiction arguing that, under § 16(b)(1), there can be no judicial review of a stay order under § 3 until after the arbitration has gone forward to a final award. (This is the first question presented for review here.) Petitioner also argued that, regardless of the Respondent's contentions to the contrary, the Petitioner had not waived its right to arbitrate by not making a pre-litigation demand for arbitration. (This is the second question presented for review.)

The Eleventh Circuit held that simply because the lower court entered an order of dismissal, it had the power to review (and reverse) not only that order, but also the stay order under § 3 without the parties engaging in arbitration notwithstanding § 3, § 16(b)(1), holdings of other circuits and the conclusions of commentators. And

in so doing it relied solely on a case decided over eight months before § 16 of the Arbitration Act became law. This creates a significant conflict among the circuit courts of appeal by allowing appeal of orders favoring arbitration under § 3. The Eleventh Circuit's ruling does not place arbitration agreements on "the same footing" with other agreements. Rather, by allowing an immediate appeal of rulings favoring arbitration, and by ruling that the right to arbitrate may be waived six years before a dispute with the plaintiff has arisen, the Eleventh Circuit relegates agreements to arbitrate to the lowest status in the hierarchy of contractual undertakings.

REASONS FOR GRANTING THE WRIT

I. A CONFLICT AMONG THE CIRCUITS EXISTS WITH RESPECT TO WHETHER A PARTY WHOSE ACTION IS STAYED UNDER SECTION 3 OF THE ARBITRATION ACT MUST ARBITRATE ITS CLAIM BEFORE OBTAINING APPELLATE REVIEW OF THE ARBITRATION ORDER.

There has long been, as this Court recognized most recently in *Allied-Bruce Terminix Companies v. Dobson*, a "judicial hostility to arbitration agreements" in "both federal and state courts." 115 S. Ct. 834, 839 (1995). For that reason, in 1925, Congress enacted the Federal Arbitration Act "to overcome courts' refusals to enforce agreements to arbitrate." *Id.* at 838. By the Act, Congress accomplished this by putting arbitration agreements on "the same footing" as other contractual undertakings. *Id.* (quoting *Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 474 (1989) (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511, in turn quoting H.R. Rep. No. 96, 68th Cong., 1st Sess. 1, 2 (1924))). The Eleventh Circuit order of which review is sought is but a lingering manifestation of such judicial hostility.

The Respondent obtained a judgment in 1980 in the Virginia action against an entity *alleged* to have been the insured owner of the IMBROS when it sank. The

protection and indemnity policy underwritten by the Petitioner, a Luxembourg company, and issued through its agents in London, contained a clause requiring arbitration of all disputes arising under the policy. (App. O). The appellate court's refusal to affirm the order staying the litigation pending arbitration pursuant to § 3 of the Act is but another "parochial refusal by the courts of one country to enforce an international arbitration agreement." *Scherk*, 417 U.S. at 516. And, as recognized in *Scherk*, such refusals will (and in this case have) invited "unseemly and mutually destructive jockeying" by litigants "to secure tactical litigation advantages," as evidenced by the Respondent's selection of a forum solely because it gives him a jurisdictional reach supposedly not available in other states. *Id.* at 517. (*See* App. G, 55a n.2, noting that the Respondent "readily admits that the reason the action was filed in [Alabama] is that . . . Alabama's long-arm statute is much broader than that of Virginia.").

The Eleventh Circuit has thus thrust Petitioner into an undefined Alabama statutory scheme, a veritable "legal no man's land," for the benefit of foreign citizens who have no claim whatsoever on the judicial resources of the United States. *Scherk*, 417 U.S. at 517. Not only is this decision in conflict with decisions of other courts of appeal, it is a decision which, independent of this conflict, has created an uncertainty with respect to a party's rights under the Federal Arbitration Act. This uncertainty should be resolved by this Court.

A. The Question

This conflict and uncertainty result from the Eleventh Circuit's unsettling misconception of the Act's purpose. The Eleventh Circuit, in direct conflict with the decisions of this Court, states,

> The purpose of the Federal Arbitration Act was to relieve congestion in the courts and to provide parties with an alternative method for dispute resolution that would be speedier and less costly than litigation.

(App. A, 15a) (quoting *Ultracashmere House, Ltd. v. Meyer*, 664 F.2d 1176, 1179 (11th Cir. 1981)).

But the Act was not passed to "relieve congestion" or to "provide parties with an alternative" mechanism for resolving disputes. On the contrary, "its passage 'was motivated, first and foremost, by a Congressional desire to enforce arbitration agreements into which parties had entered.'" *Volt Info. Sciences*, 489 U.S. at 478 (quoting *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 220 (1985)). By enacting this legislation, Congress intended "to place such agreements 'upon the same footing as other contracts.'" *Volt Info. Sciences*, 489 U.S. at 478 (quoting *Scherk*, 417 U.S. at 511, in turn quoting H.R. Rep. No. 96, 68th Cong., 1st Sess., 1, 2 (1924)). *See also*, *Allied-Bruce Terminix Companies*, 115 S.Ct. at 838 ("the basic purpose of the Federal Arbitration Act is to overcome courts' refusals to enforce agreements to arbitrate."); and *Dean Witter Reynolds*, 470 U.S. at 219 ("We therefore reject the suggestion that the overriding goal of the Arbitration Act was to promote the expeditious resolution of claims."). It is thus no wonder that, rather than putting agreements to arbitrate on "the same footing" as other provisions in a contract, the Eleventh Circuit decision relegates them to a lower status by permitting a court to arrogate to itself the power to enforce certain provisions of a contract (such as those requiring the payment of money) while refusing to enforce agreements to arbitrate, and by finding a waiver of the right to arbitration based on the absence of a pre-litigation arbitration demand. This aberrant decision results from a fundamental misunderstanding of the very purpose of the Act.

The Act, as noted, was designed to overcome judicial hostility to arbitration, a matter of extreme importance in international transactions.

> A contractual provision specifying in advance the forum in which disputes shall be litigated and the

> law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction.

Scherk, 417 U.S. at 516.

The Act, therefore, must be construed broadly in favor of arbitration. *See, e.g., Allied-Bruce Terminix Companies*, 115 S.Ct. 834 (1995).

In 1988, Congress broadened even further the reach of the Act by prohibiting appeals of rulings under §§ 3 and 4 favoring arbitration over litigation. These prohibitions are found in § 16, a section which was part of the 1988 Judicial Improvements and Access to Justice Act, which became law on November 19, 1988. (This date is crucial to an analysis of the Eleventh Circuit decision since, in determining appellate jurisdiction, it relied on *State Establishment for Agric. Prod. Trading v. M/V WESERMUNDE*, 838 F.2d 1576 (11th Cir.), *cert. denied*, 488 U.S. 916 (1988), decided eight months prior to the effective date of the Act of which § 16 was a part.) No decision of this Court through this date has construed any portion of section 16, although mention is made of it in two cases.

The Congressional intent to promote enforcement of arbitration agreements is further demonstrated by the fact that the Act is incorporated into a treaty to which the United States and essentially all of the world's economic powers are parties. Convention on the Recognition and Enforcement of Foreign Arbitral Awards. *See* 9 U.S.C. § 208.

Section 16 establishes a comprehensive set of rules which govern when orders entered under §§ 3 or 4 may be appealed and when they may not. In analyzing § 16, however, we must focus first on orders to stay litigation issued under § 3 because a close reading of the language of § 3 is necessary to understand § 16. In § 3, Congress dictated that if a suit was brought on "any issue referable to arbitration under an agreement in writing," the court

shall, on motion, "stay the trial of the action *until such arbitration has been had.*" 9 U.S.C. § 3 (emphasis added). Thus § 16 allows an appeal of an order *refusing* a stay (§ 16(a)(1)(A)), but, § 16(b)(1) prohibits an appeal "from an interlocutory order *granting* a stay of any action under § 3 of this title." (Emphasis added).

Section 16(b)(1) lies at the heart of this petition. Specifically, Petitioner requests this Court to determine a question which it has never before been called upon to decide: Whether, under § 16(b)(1), a party whose action is stayed pending arbitration under § 3 must first arbitrate his dispute with the opposing party before obtaining appellate review of that order. (Such review, incidentally, is provided for in the Act after arbitration. 9 U.S.C. §§ 9, 10 and 11. *See also, Vimar Seguros y Reaseguros,* 115 S.Ct. 2322, 2329 (1995); and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 638 (1985)).

The rule recognized by the other circuits which have considered the issue is that appellate review of an order favoring arbitration cannot be had "until such arbitration has been had." 9 U.S.C. § 3. David D. Siegel, author of the "Practice Commentary" printed at 9 U.S.C.A. 219, states that,

> [t]he mission of § 16 is to assure that if a district court does determine that arbitration is called for, the court system's interference with the arbitral process will terminate then and there, leaving the arbitration free to go forward.

In other words, in the language of § 3, litigation must cease "until such arbitration has been had." [This Practice Commentary is quoted with approval in decisions discussed below.] The Eleventh Circuit, however, ruled that a plaintiff, by ignoring the § 3 order, thus inviting dismissal of his case, can get to the appellate court by virtue of the dismissal and, while there, have the propriety of the stay order judicially reviewed.

Thus, whether the court's involvement with a dispute should terminate when an order is entered under § 3 staying further litigation "until . . . arbitration has been had . . . leaving the arbitration free to go forward" (Siegel at 219), or whether the § 3 order can be appealed *before* "such arbitration has ben had," is the issue we ask this Court to review.

B. The Eleventh Circuit Decision

The crux of the conflict is the Eleventh Circuit's determination that Respondent was *not* required to wait "until such arbitration had been had" before obtaining appellate review of the district court order requiring arbitration. Notwithstanding that the language and policies underlying the Act required Respondent to arbitrate before seeking appellate review of the stay order, the Eleventh Circuit held that arbitration was unnecessary. In so doing, it relied on *State Establishment,* 838 F.2d 1576, a case decided on March 11, 1988, to construe an Act of Congress which did not become law until November 19, 1988, over eight months later. "[W]e are guided by our decision in a case [*State Establishment*] that was presented in the same procedural posture as the one at hand." (App. A, 8a). Not only was the jurisdictional aspect of *State Establishment* rendered null by statute almost as soon as it was announced, the Eleventh Circuit's hostility toward foreign arbitration expressed in that same case was rejected by this Court in *Vimar Seguros y Reaseguros,* 115 S.Ct. 2322 (1995). Clearly the Eleventh Circuit's misconception of the purposes of the Act and its reliance on *State Establishment* strip its decision of any presumption of correctness to which it might otherwise have been entitled.

Not only did the decision begin with a misunderstanding of the Act and reliance on a dated case, the Eleventh Circuit's decision eschewed any discussion of the prohibitions of appellate review contained in § 16 (b)(1). Its only mention of that section was made

in a passing note of the Respondent's position. (App. A, 8a). No mention is made of the different judicial treatment accorded arbitrability issues in other circuits, notwithstanding that these questions were briefed for the court. Rather, the Eleventh Circuit concluded that because the district court's dismissal order, entered because of the Respondent's refusal to arbitrate, was itself a "final" judgment, it automatically had jurisdiction to review the prior order. The Eleventh Circuit recounted that in *State Establishment*, it was aware that a litigant ignoring a stay order under § 3 of the Act was taking a risk because "if the district court was correct in ordering arbitration, the dismissal with prejudice for failure to comply with that order would be affirmed by this court." (App. A, 9a (quoting *State Establishment*, 838 F.2d at 1579)). The Eleventh Circuit then closed the book on the jurisdictional issue by stating that "[f]ortunately for Morewitz . . . we disagree with the district court's order requiring the parties to arbitrate this dispute." (App. A, 9a). It never occurred to the Court that there was any issue before it other than whether it disagreed with the district court's order staying litigation.

C. The Conflict

It is therefore not surprising that the Eleventh Circuit's holding is contrary to the decisions of the Tenth, Seventh, and Fourth Circuits. The Tenth Circuit in *Adair Bus Sales, Inc. v. Bluebird Corp.*, 25 F.3d 953 (10th Cir. 1994) was presented with an issue very similar to this one but resolved it in an altogether different way. A plaintiff sued for breach of contract. The defendant moved to stay the suit pending arbitration under § 3 of the Act. Instead of staying the action, however, the district court dismissed it and ordered the parties to proceed to arbitration. Without engaging in arbitration, the plaintiff appealed immediately claiming (as did Respondent below) that the defendant "was estopped from asserting a claim for arbitration." *Adair*, 25 F.3d at 955. The defendant challenged the jurisdiction of the

appellate court on the strength of the strict prohibition against appeal in § 16(b)(1) of the Act. If the Tenth Circuit had used the Eleventh Circuit's logic, it would have concluded that simply because it had jurisdiction as a result of the dismissal order, it *automatically* had appellate jurisdiction over the stay order. But the Tenth Circuit rejected such logic. It held that because "the appeal is presented to us upon the district court's order of dismissal we have appellate jurisdiction . . . and may correct the procedural error," (*id.*) but, consistent with the purposes of the Act, it refused to consider the order under § 3 mandating arbitration because such an order was not reviewable on appeal until after arbitration had been concluded. This is obviously in conflict with the Eleventh Circuit's holding.

The practical result of this conflict is that a plaintiff in the Fourth, Seventh and Tenth Circuits, but not the Eleventh and possibly the Sixth cannot ignore an order under § 3 to arbitrate but must engage in arbitration *before* obtaining judicial review of that order. In the Eleventh Circuit, however, a plaintiff may disobey a § 3 order and thereby dodge the Act's prohibition against appeal.

The law in the Seventh Circuit also conflicts with the Eleventh Circuit's law. *Perera v. Siegel Trading Co., Inc.*, 951 F.2d 780 (7th Cir. 1992) contains an analysis of various decisions of other circuits and holds that when a stay order is entered pursuant to § 3, no appellate review of that order may be had until after arbitration is completed. Stated differently, after a stay order is entered, appellate review of the stay order cannot be had regardless of what "final" orders are later entered by the district court.

Thus, in *Perera,* an order to stay pending arbitration was not reviewable on appeal notwithstanding the district court's subsequent entry of a "final judgment" under Rule 54(b). An opposite conclusion, however, was reached in *State Establishment,* the Eleventh Circuit's

guiding light. In *State Establishment*, 838 F.2d at 1583, the Eleventh Circuit stated that when the plaintiff "informed the court [as did Respondent below] that it absolutely refused" to arbitrate its dispute, the district court "should have certified the question under Rule 54(b)," a ploy expressly ruled ineffective by the Seventh Circuit. Specifically the Seventh Circuit stated that "the entry of a Rule 54(b) judgment does not change the interlocutory nature of the district court's order," and cannot therefore confer jurisdiction on an appellate court to review the stay order. *Perera*, 951 F.2d at 786.

But, the Eleventh Circuit's approval of basing appellate jurisdiction over a § 3 order on an after-entered order is obvious. The Court seems to suggest that the district court should have certified the arbitration issue under 28 U.S.C. § 1292(b), as requested by the Respondent, and that it (the Eleventh Circuit) would have accepted the case for review. (App. A, 20a). The Eleventh Circuit is thus saying that it really does not matter how a party subject to a § 3 stay order gets that order to the appellate court, whether under § 1292(b), Rule 54(b) or dismissal for disobedience of court orders, the Eleventh Circuit will review (and reverse) it regardless of § 16. But the rule requiring that parties subject to a stay order arbitrate before appealing cannot be so easily escaped. And other circuits do not allow it.

The Fourth Circuit, in a series of decisions beginning with *Stedor v. Armtex, Inc.*, 947 F.2d 727 (4th Cir. 1991), has rejected the Eleventh Circuit's approach. The dispute in *Stedor* arose from a contract which contained an arbitration clause. In seeking to enforce the clause, the plaintiff served notice of its intention to arbitrate. The defendant responded by suing for an injunction against arbitration. In response, the plaintiff sought, and the district court issued, an order compelling arbitration under authority of § 4 of the Act. On appeal, the Fourth Circuit was confronted with the question of whether an order under § 4 compelling arbitration is immediately reviewable in light of § 16 of the Act.

The Court in *Stedor* noted that § 16 establishes a framework in which immediate appeal from orders favoring litigation over arbitration is allowed, § 16(a)(1)(A-C), while § 16 specifically denies the rights to an immediate appeal from interlocutory orders which give arbitration precedence over litigation. 9 U.S.C. § 16(b)(1-4). As support for the proposition that § 16 requires parties to proceed to arbitration before seeking appellate review if the district court order is in favor of arbitration, the Fourth Circuit, quoting David D. Siegel, stated that

> if the district court . . . determine[s] that arbitration is called for, the court system's interference with the arbitral process will terminate then and there, leaving the arbitration free to go forward. To accomplish this, § 16 provides in general that there may be no appeal from the proarbitration determination until after the arbitration has gone forward to a final award.

Stedor, 947 F.2d 730 (quoting Siegel, *Practice Commentary*, 9 U.S.C.A. § 16, at p. 219 (West Supp. 1991)).

Notwithstanding this, however, the court in *Stedor* held that the district court's order directing arbitration to proceed under § 4 was reviewable on appeal because it was a "final" decision given the judicial context in which it was issued. Thus, under authority of 16(a)(3), which permits an appeal from "a final decision with respect to an arbitration," the court addressed the merits of the appeal.

At its core, the holding in *Stedor* turned on a mechanical application of the "embedded" versus "independent" analysis. Specifically, the court held that the parties need not first arbitrate before appealing because the § 4 order "was issued in an independent action in which the only issue before the court was the dispute's arbitrability." *Stedor*, 947 F.2d at 729. The Fourth Circuit reasoned that the order under § 4 disposed of the whole case on the merits, thereby satisfying the requirements of finality

in § 16(a)(3). Thus the § 4 order did not fall within the mandate of § 16(b)(2) which disallows appeals from interlocutory orders directing arbitration to proceed under § 4.

However, as the court in *Stedor* further stated, if the arbitrability question is "embedded" in a broader action in the sense that other relief is sought in addition to arbitration, an order directing the parties to arbitrate is not a final order which invokes appellate review. On the contrary, any such order directing arbitration to proceed, issued within the context of an "embedded" proceeding, is interlocutory and thus appellate review is prohibited by § 16(b). *Id.* at 731.

In a pair of later cases, the Fourth Circuit further developed and applied the "independent" versus "embedded" analysis. In *Humphrey v. Prudential Sec. Inc.*, 4 F.3d 313 (4th Cir. 1993), the Fourth Circuit applied the "independent" versus "embedded" analysis in a manner which dictated that the court had no appellate jurisdiction of an order compelling arbitration and staying the action until arbitration had been performed. *Humphrey* was a suit involving various violations of federal and state law. The defendants filed responsive pleadings in which the issue of arbitration was not addressed. Then, the plaintiff moved for an order compelling arbitration and staying his own action. The district court concluded that all of the claims were arbitrable and granted the motion to compel arbitration. *Humphrey*, 4 F.2d at 314.

As the complaint presented more than the limited issue of arbitrability, the order to compel arbitration in *Humphrey*, as in the instant case, was clearly "embedded." Therefore, the court concluded that the arbitration order was not a final decision subject to appellate review. *Id.* at 318. On the contrary, the order was the type of interlocutory order favoring arbitration the appeal of which was prohibited. *Id.* at 319.

Similarly, in *American Casualty Co. v. L-J, Inc.*, 35 F.3d 133 (4th Cir. 1994), the court dismissed an appeal for want of appellate jurisdiction. In that case, a general

contractor sought to enforce an arbitration clause in a contract against a subcontractor's surety. The general contractor sent a demand for arbitration to both the surety and the subcontractor in which actual and punitive damages were sought. The surety responded by filing suit seeking declaratory judgment and moving to stay arbitration. In response, the general contractor moved to stay litigation and compel arbitration. The district court granted the later motion and the surety appealed.

The question of arbitrability was an "embedded" issue in the surety's action. Accordingly, the Fourth Circuit once again refused to review the merits of an order compelling arbitration and staying the litigation "pending the outcome of the arbitration between the parties." *American Casualty*, 35 F.3d at 133. In allowing the arbitration agreement to be enforced as written, the court in *American Casualty* stated that "§ 16 generally precludes appellate review of orders that favor arbitration over litigation 'until after the arbitration has gone forward to a final award.'" *Id.* at 135 (citing *Stedor*, 947 F.2d at 730 (quoting Siegel, *Practice Commentary*, 9 U.S.C.A. § 16, at 270 (West Supp. 1994)).

As expressly noted in *Humphrey*, and implicitly noted in *American Casualty*, the Federal Arbitration Act provides a mechanism by which a district court's order may be reviewable on appeal "after the arbitration has gone forward to a final award." According to *Humphrey* and *American Casualty*, an order favoring arbitration, issued within the judicial setting of an embedded proceeding, is not a reviewable final judgment until after the arbitration process has resulted in an award and a district court has exercised the power to review arbitration awards as provided for in the Act. *Humphrey*, 4 F.3d at 319; and *American Casualty*, 35 F.3d at 139.

Therefore, the Fourth Circuit decisions are in accord with the general mandate of § 16 in that, except for an order issued in an independent proceeding, an order favoring arbitration over litigation is not immediately appealable. As such, parties are required to arbitrate before

invoking appellate review which in turn results in the situation envisioned by Congress. Namely, the arbitration process is allowed to go forward free of any judicial interference in the form of lengthy premature appeals. The Fourth Circuit's adherence to the "independent" versus "embedded" analysis clearly conflicts with the Eleventh Circuit's holding. Contrary to the situation in the Fourth Circuit, a party in the Eleventh Circuit may obtain appellate review of a stay order, even in the context of an "embedded" proceeding, before the arbitration process has gone forward to a final award.

II. A CONFLICT AMONG THE CIRCUITS EXISTS WITH RESPECT TO WHETHER A PARTY MAY WAIVE ITS CONTRACTUAL RIGHT TO COMPEL ARBITRATION BY FAILING TO MAKE A PRE-LITIGATION DEMAND TO ARBITRATE.

A. The Question

The Eleventh Circuit also held that a party, by failing to make a pre-litigation demand for arbitration, could lose forever its right to arbitration.

The question of waiver of arbitration is not new. Courts considering this issue require that an analysis must begin with the general proposition that, while a party can waive its right to arbitrate by acts inconsistent with such a right, there is an overriding federal policy favoring enforcement of arbitration agreements, and waiver is not to be lightly inferred. *Moses H. Cone Memorial Hosp. v. Mercury Constr.*, 460 U.S. 1, 24 (1983) (the Arbitration Act "is a Congressional declaration of liberal federal policy favoring arbitration agreements."); *Rush v. Oppenheimer & Co.*, 779 F.2d 885, 887 (2nd Cir. 1985). Courts are to "rigorously enforce agreements to arbitrate." *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985). Any doubt concerning waiver must be resolved in favor of arbitration. *Moses H. Cone Memorial Hosp.*, 460 U.S. at 24-25.

Thus, "[t]he burden on one seeking to prove a waiver of arbitration is a heavy one." *Sibley v. Tandy Corp.*, 543 F.2d 540, 542 (5th Cir. 1976), *cert. denied*, 434 U.S. 824 (1977). In those rare instances in which waiver is found, the party guilty of waiver has generally engaged in some action (as opposed to taking no action) inconsistent with the right to arbitrate. *See, e.g., National Foundation for Cancer Research v. A.G. Edwards & Sons*, 821 F.2d 772, 774 (D.C. Cir. 1987). Here, however, the Eleventh Circuit has held that doing nothing, specifically not demanding arbitration in 1979, nearly six years before suit was filed in Alabama, as opposed to doing something inconsistent with the right to arbitrate can constitute waiver. In so holding it stands alone among the circuits.

Under the principles set forth by this Court, it is clear the Eleventh Circuit's conclusion that the Petitioner waived its contractual right to compel arbitration six years before this action was commenced is both unsound and in conflict with the decisions of other circuits.

B. The Eleventh Circuit Decision

The Eleventh Circuit grounded its finding that the Petitioner waived its contractual right to compel arbitration on nothing more than the Petitioner's failure to make a pre-litigation demand for arbitration against General Development in 1979 during the earlier Virginia litigation. The Petitioner was not a party to that litigation, which began in 1976, some nine years before the Alabama litigation was instigated. Nonetheless, the Eleventh Circuit concluded that "[i]n short, the appropriate time for [the Petitioner] to contest coverage and demand arbitration with General Development was during the proceedings in the United States District Court for the Eastern District of Virginia." (App. A, 19a). Then, based on nothing more, and without analysis, the court concluded that because the Petitioner "has waived its right to arbitrate with General Development, it has also waived its right to demand arbitration with [the Respondent]," whose claims

did not surface in the Southern District of Alabama until June 26, 1985. (App. A, 20a).

The Eleventh Circuit did not base its finding of waiver on any acts of the Petitioner *after* the Alabama litigation was commenced. When suit was filed Petitioner challenged the district court's subject matter jurisdiction and the Court dismissed Respondent's action on that ground. (App. G). When the Eleventh Circuit reversed the decision of the district court and thus held that the lower court did indeed have jurisdiction (App. F), Petitioner then moved to stay this suit under § 3 of the Act. A party who contests the court's jurisdiction, as Petitioner did here, does not waive its right to arbitrate. *Sedco, Inc. v. Petroleos Mexicanos Mexican Nat'l. Oil*, 767 F.2d 1140 (5th Cir. 1985). Thus, it is clear that we confront here a finding of waiver made by an appellate court (reversing the district court's findings) predicated solely on Petitioner's failure to demand arbitration against a person *other than the Respondent* during the pendency of a suit to which Petitioner was not a party.

The Eleventh Circuit's holding that the Petitioner waived its arbitration rights by failing to make a pre-litigation demand hardly puts arbitration agreements on "the same footing" with other agreements and, thus, violates the Act's basic tenet. *See Volt Info. Sciences*, 489 U.S. at 478. On the contrary, arbitration agreements are treated with judicial hostility by the Eleventh Circuit. Moreover, the ruling completely thwarts the federal policy which favors arbitration and resists a finding of waiver. As noted earlier, the Act's passage was intended "to place such agreements 'upon the same footing as other contracts.'" In passing the Act, Congress realized that it is an absolute necessity that parties entering into arbitration agreements have at least a reasonable measure of certainty that their agreements will be enforced by the courts. It follows then that these parties must know with reasonable certainty what actions on their part will deprive them of their contractually guaranteed arbitration rights.

Without question, the Eleventh Circuit's decision robs the parties to an arbitration agreement of the certainty that the Act was designed to provide and which is essential in international transactions. *See Scherk*, 417 U.S. at 511; *Vimar Seguros y Reaseguros, S.A.*, 115 S.Ct. at 2328. Moreover, its conclusion that a party can be deprived of its contractual right to arbitrate by failing to make a formal claim six years before the suit against it perpetuates the historical refusal of courts to put arbitration agreements on "the same footing" as other agreements. If this decision stands, parties to arbitration agreements who perceive that they might, one day in the future, even by chance, be summoned into a court of the Eleventh Circuit, will never know whether they should demand arbitration of any possible claims against them before a lawsuit on such claims is filed or whether they might wait and never have suits filed against them. If they do nothing and are later hailed into a court within the Eleventh Circuit, they may be deemed to have forever waived their right to arbitrate. On the other hand, if lucky enough to be sued elsewhere, their right to arbitrate will survive. This is not what Congress intended when it enacted the Act and is certainly in conflict with what other circuit courts have held. This Court has mandated that such uncertainty should not exist. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972). If a vessel undertakes a voyage and must "traverse the waters of many jurisdictions," an intolerable uncertainty would (and in the Eleventh Circuit does) exist "if jurisdiction were left to any place where [a party] might happen to be found." *The Bremen*, 407 U.S. at 13. This Court in *The Bremen* required the enforcement of a forum-selection clause, noting that "[a]n agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause." *Id.* at 519.

C. The Conflict

In addition to its frontal assault upon the philosophical underpinnings of the Arbitration Act, the Eleventh Circuit's holding is in direct conflict with two decisions of

the Fifth Circuit, one of which is binding authority, and is in conflict with decisions of the Eighth Circuit and district court decisions within the Second and Eleventh Circuits which followed the rules previously laid down by the courts.

The most troubling conflict is with the Fifth Circuit's decision in *General Guaranty Ins., Co. v. New Orleans Gen. Agency, Inc.*, 427 F.2d 924 (5th Cir. 1970). There, in deciding that a pre-litigation demand was not necessary for a party to preserve its right to arbitrate, the Fifth Circuit concluded that "[t]he Act is not limited by its terms to cases in which the party moving for a stay has made a pre-suit demand for arbitration." *Id.* at 928. As the court stated, "[t]o limit the Act to so narrow a range of cases would be inconsistent with the salutary Congressional purposes of furthering the intent of the parties and relieving the courts of burdens." *Id.* The Fifth Circuit also noted that further evidence of the non-existence of such a limitation was "indicated by the many cases in which there has been searching inquiry into *post*-suit behavior to determine if there has been default or waiver." *Id.* (emphasis added).

Finally, the Fifth Circuit noted the unfairness inherent in requiring a party to make a pre-litigation demand for arbitration under the threat of losing forever its contractual right to arbitrate. It correctly observed that requiring such a demand before suit is filed is tantamount to requiring a party to seek out and defend, indeed invite, claims against it which might not otherwise have been made or which are not meritorious. *Id.* The purpose of the Act is not to incite parties to barratry. Thus *General Guaranty* establishes the proposition that a party does *not* waive its contractual right to arbitration by failing to demand arbitration upon the occurrence of an incident which might give rise to litigation. Stated differently, a pre-litigation demand for arbitration is not a condition precedent to invoking the stay envisaged by § 3. *See Lubrizol Int'l. v. M/V STOLT ARGOBAY*, 562 F. Supp. 565, 573 (S.D.N.Y. 1982) (citing *General Guaranty* for

the holding that "arbitration [is] not waived by failure to file [a] pre-suit demand.").

In subsequent decisions, the Fifth Circuit has held steadfast to the proposition that "it is not necessary that the party moving for a stay of proceedings have made a pre-suit demand for arbitration." *Tenneco Resins, Inc. v. Davy Int'l. AG*, 770 F.2d 416, 419 (5th Cir. 1985). Although some courts have indicated that a party's failure to assert a pre-litigation demand for arbitration may be one factor contributing to a finding of prejudice, no court considering the issue has ever concluded that such a failure in and of itself constitutes waiver. *See, e.g., Stifel, Nicholaus & Co., Inc. v. Freeman*, 924 F.2d 157 (8th Cir. 1991). But the Eleventh Circuit so held in the decision we ask this Court to review.

Curiously, in arriving at its finding of waiver, the Eleventh Circuit never mentioned the binding decision in *General Guaranty*. Instead, with no real analysis of the issue before it, the Eleventh Circuit concluded that "[a]lthough the court in *Tenneco Resins* . . . noted that a party is not obligated to make a pre-suit demand for arbitration, we do not believe that an insurer should be permitted to collude with its insured to the detriment of the injured third-party." (App. A, 19a). But is this collusion anxiety a justification for requiring a pre-litigation demand for arbitration in order not to lose the right to arbitrate? If so, where is the evidence of collusion? None exists. Indeed, no one has suggested collusion. Why then did the court make such a statement? Perhaps for the same reason the court resolved the jurisdictional issue on a case decided eight months before enactment of § 16. Perhaps for the same reason it misstated the Congressional purpose behind the Arbitration Act.

Any question of collusion, we submit, is a separate issue which should have been determined by the district court only if expressly pleaded by the party seeking to avoid the arbitration agreement. Section 2 of the Act provides that an arbitration clause in a contract is "valid,

irrevocable, and enforceable, save upon such grounds as exist in law or in equity for the revocation of any contract." 9 U.S.C. § 2. Collusion of the type imagined by the Eleventh Circuit would certainly constitute a basis for revocation of the contract. Yet there was no claim of collusion and certainly no collusion has been found or suggested by the district court. Furthermore there has been no affirmative allegation of such misconduct under Rule 8(c), Fed. R. Civ. P., which requires that such defenses to a claim be set forth affirmatively. When this is done, the district court can inquire into such questions, as it did at length on the question of waiver.

In any event, the concerns about imagined but unproved collusion are premature. In *Vimar Seguros y Reaseguros*, the plaintiff claimed that Japan would not follow the dictates of the governing law. 115 S.Ct. at 2329. This Court observed that such a concern is premature because here "Respondents seek only to enforce the arbitration agreement." *Id.*

Nonetheless, based on nothing more than its assumption that there existed an opportunity for collusion in the years before this suit was commenced, the Eleventh Circuit ignored the federal policy favoring arbitration, ignored the strong presumption against a finding of waiver, and ignored binding and persuasive decisions from other circuits in order to advance the indefensible proposition that a party's failure to make a pre-litigation demand for arbitration can constitute an irretrievable loss of its contractual right to arbitrate. The extent of the uncertainty which the Eleventh Circuit has brought to this issue is demonstrated by the decisions of lower courts which have followed what seemed to be well-reasoned precedent. For instance, in *Southside Internist Group v. Janus Capital Corp.*, a case within the Eleventh Circuit's jurisdiction, the court noted that binding precedent made "clear that failure to file a pre-suit demand for arbitration is not a waiver." 741 F. Supp. 1536, 1539 (N.D. Ala. 1990). *See also Lubrizol*, 562 F. Supp. 565 (S.D.N.Y. 1982), (following the Fifth Circuit's decision in *General Guar-*

anty). In *Allied-Bruce Terminix Companies*, district court decisions were deemed relevant to determining the extent in conflicts in decisions of the courts of the various circuits. 115 S.Ct. at 837.

By requiring a pre-litigation demand for arbitration, the Eleventh Circuit has saddled a party with a duty to demand arbitration of potential claims against it and, in so doing, ignores the fact that (i) such claims may have never been prosecuted in either arbitration proceedings or litigation, and (ii) may in fact be claims without merit. Such a decision is in direct conflict with other circuit's decisions which recognize a party's legitimate interest in, and the judicial policy of, not inviting claims against it. This pre-litigation waiver requirement created by the Eleventh Circuit is yet another reason for this Court to review the Eleventh Circuit's decision of September 6, 1995.

III. A CONFLICT AMONG THE CIRCUITS EXISTS WITH RESPECT TO WHETHER A FEDERAL DISTRICT COURT EXERCISING ADMIRALTY JURISDICTION MUST APPLY DIRECT ACTION STATUTES OF THE STATE IN WHICH THE COURT IS SITUATED WITHOUT REGARD TO FEDERAL ADMIRALTY CHOICE OF LAW RULES.

A. The Question

The Eleventh Circuit ruled in this case that a federal district court exercising admiralty jurisdiction is bound to apply the direct action statutes of the state in which it is situated as the procedure of the forum and, for that reason, must not conduct any federal choice of law analysis. This is in conflict with the law of the Fifth and Second Circuits. In *Fleming v. Pan American Fire & Casualty*, the Fifth Circuit Court of Appeals held that the applicability of the Alabama direct action statutes is to be determined under choice of law rules. 495 F.2d 535 (5th Cir. 1974). And, in *State Trading Corp. v. Assuranceforeningen Skuld*, the Second Circuit recognized that while state

direct action statutes may be properly applied in admiralty cases, they "must yield in . . . admiralty suit[s] to federal choice of law rules." 921 F.2d 409, 414. The significance of this circuit split lies in the fact that the Eleventh Circuits' holding compels district courts to ignore Supreme Court jurisprudence respecting admiralty conflict rules. *See, e.g., Lauritzen v. Larsen*, 345 U.S. 571 (1953). Such a holding undermines the goals of uniformity and predictability in admiralty law. The Second Circuit has recognized the balkanizing effect of the result reached by the Eleventh Circuit and cautioned that applying direct action statutes "under a strained designation as procedural law" will create "substantial variation" in rights and duties merely "as a result of choice of forum that choice of law doctrine was designed to prevent." 921 F.2d at 416.

Furthermore, the Eleventh Circuit's conclusion that a federal district court is compelled to apply purported *procedural* provisions of the state in which the district court is situated is a perversion of this Court's rule in *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938).

B. The Eleventh Circuit Decision

This Court should grant certiorari and resolve this conflict in accordance with the law of the Fifth and Second Circuits. Respondent initiated this action under an English direct action statute. However, on remand following the first appeal to the Eleventh Circuit, Respondent "abandoned his argument that the English bankruptcy statutes applied, and instead, relied solely on the Alabama direct action statutes." (App. A, 7a). The Eleventh Circuit recognized the conflict, *i.e.*, "whether the English bankruptcy statutes or the Alabama direct action statutes apply." (App. A, 11a). But it avoided the conflict by concluding that the Alabama direct action statutes apply automatically as the procedure of the forum. (App. A, 13a). According to the court, the Alabama direct action statutes are procedural and therefore not subject to any choice of law analysis in this admiralty action. *Id.* By this, the Eleventh Circuit is pre-

pared to compel the automatic application of the Alabama direct action statutes in this admiralty action brought by a *Virginia* resident, representing *foreign* seamen, to compel a *Luxembourg* marine underwriter to pay a judgment rendered in a *Virginia* court against a *Cypriot* corporation.

The fallacy in the Eleventh Circuit's ruling begins with the court's misconception of *Wilburn Boat Co. v. Fireman's Fund*, 348 U.S. 310 (1955). It correctly cites *Wilburn Boat* as establishing that "in the absence of a controlling federal admiralty principle, state law can be applied in an admiralty case." (App. A, 11a). In the context of this case, though, this settled principle is of no moment since, as the court itself notes, the conflict does not involve federal admiralty law, but rather a determination of whether English or Alabama law applies. *Id.* However, the Eleventh Circuit then incorrectly inferred from *Wilburn Boat* a license to indiscriminately apply Alabama law without regard to any choice of law analysis when, in fact, this Court in *Wilburn Boat* remanded with instructions to apply "appropriate" state law, thereby indicating that a conflict analysis is required. *Wilburn Boat*, 348 U.S. at 320-21.

Upon its misconception of *Wilburn Boat*, the Eleventh Circuit arrived at the conclusion that the Alabama direct action statutes are state procedural provisions which are applicable without regard to any choice of law analysis. (App. A, 11a-13a). However, the Alabama Supreme Court established that the Alabama direct action statutes are not procedural in *Macey v. Crum*, 30 So. 2d 666 (Ala. 1947). In *Macey*, the Alabama Supreme Court explained that the Alabama direct action statutes "are *more than procedural in character* and give the injured party a vested interest . . . ." *Id.* at 667 (emphasis added).

C. The Conflict

It is at this point in the Eleventh Circuit's opinion that the court misinterprets *Fleming v. Pan American Fire &*

Casualty, 495 F.2d 535 (5th Cir. 1974) and creates a split with the Fifth Circuit. The Eleventh Circuit's conclusion that Alabama's direct action statutes apply automatically and without regard to conflicts analysis is based on its flawed view of *Fleming* as a case in which Alabama's direct action statutes applied without regard to the place of contract formation or the residence of the contracting parties. (App. A, 13a). But the Fifth Circuit Court of Appeals' application of Alabama's direct action statutes in *Fleming* was *not* without regard to appropriate choice of law rules. Rather, the court in *Fleming* expressly recognized that the applicability of the Alabama direct action statutes was governed by Alabama's choice of law rules because the action was based on diversity jurisdiction and brought in Alabama. Relying on *Klaxon Co. v. Stentor Electric Mfg.*, 313 U.S. 487 (1941), in which this Court established that forum choice of law rules govern in diversity actions, the Fifth Circuit stated that "the applicability . . . of [the Alabama direct action statutes] must be determined in accordance with the law of Alabama." Thus, while it is true that the Alabama direct action statutes were applied in *Fleming* without regard to the place of contract formation or residence of the parties, the statutes were applied *only because* the applicable choice of law rules, those of Alabama under *Klaxon*, provided for that result, not because they were procedural provisions of the forum to be applied automatically. *Fleming*, then, establishes that the Alabama direct action statutes are subject to choice of law analysis. The Eleventh Circuit opinion now before this Court, then, is in conflict with the Fifth Circuit's holding in *Fleming*. Furthermore, since *Fleming* is binding on the Eleventh Circuit, this case places the Eleventh Circuit in conflict with its own precedent.

Significantly, Petitioner submits that the very premise that a federal district court sitting in admiralty (or diversity) must apply the *procedural* law of the state in which it is situated is defective. It is well settled that a district court exercising diversity jurisdiction must

apply the *substantive* law of the state in which it is situated (*Erie Railroad v. Tompkins*), including the choice of law rules of the forum state (*Klaxon Co. v. Sentor Electric Manufacturing Co.*, 313 U.S. 487 (1941)). And, as previously noted, district courts exercising admiralty jurisdiction over marine insurance matters are to apply *appropriate* state law in the absence of a controlling admiralty rule. (*Wilburn Boat*, 348 U.S. 310; *see also, Steelmet, Inc. v. Caribe Towing Corp.*, 779 F.2d 1485, 1487 (11th Cir. 1986) (instructing that the application of a direct action statute under *Wilburn Boat* requires the district court to "identify the state law involved.")). But the Eleventh Circuit cites no authority for its inexplicable mandate that federal district courts in Alabama, and in Georgia and Florida, must apply *procedural* provisions of their respective forum states. This is a perversion of the *Erie* doctrine.

The Eleventh Circuit decision conflicts with the law of the Second Circuit. In *State Trading Corp. v. Assurance-foreningen Skuld*, 921 F.2d 409 (2d Cir. 1990), the Circuit Court of Appeals for the Second Circuit was presented with the very issue in question and flatly rejected the reasoning and rule of the Eleventh Circuit. The Second Circuit declared:

> To the extent the dictum in footnote five of *Morewitz* can be read to support the proposition that a federal court sitting in admiralty must apply a direct action statute as the procedural law of the forum state, without any choice of law analysis, *we decline to follow it*.

921 F.2d at 415 (emphasis added). Of course, the "dictum in footnote five" is now law in the Eleventh Circuit.

The plaintiff in *State Trading Corp.*, an Indian corporation, was the owner of a cargo that was lost in international waters upon the sinking of a vessel. The vessel was owned by a Panamanian corporation and was managed by a Belgian corporation. Skuld, a Norwegian insurance association was the vessel's insurer. The plaintiff obtained

an arbitration award against the vessel owner which award was confirmed by the District Court for the Southern District of New York. Since the owning company had been dissolved, the plaintiff filed suit against Skuld in the District Court for the District of Connecticut, attempting to gain the benefits of Connecticut's direct action statute.

The plaintiff's suit was dismissed by the court which affirmed a magistrate's ruling that "it is abundantly clear that . . . the *substantive* laws of the State of Connecticut, as expressed in [Connecticut's direct action statute], have absolutely no bearing on this litigation." *State Trading Corp.*, 921 F.2d at 411 (emphasis in original). The Second Circuit affirmed and held that the direct action statute was subject to federal choice of law rules. Relying on its decision in *Collins v. American Automobile Ins. Co.*, 230 F.2d 416 (2nd Cir. 1956), the court recognized that the direct action statute was a substantive provision "because it creates a right of action against a defendant where no such right previously existed." *State Trading Corp.*, 921 F.2d at 421-22. Here, the court cites with approval Judge Tjoflat's separate decision in the first *Morewitz* opinion (App. F, 44a) where he criticizes the Eleventh Circuit's conclusion that direct action statutes do not create substantive rights. *Id.* at 416. Thus, expressly disagreeing with the Eleventh Circuit, the Second Circuit Court of Appeals stated that the "direct statute must yield in this admiralty suit to federal choice of law rules." *Id.*

Certiorari should be granted to give effect to the admiralty choice of law jurisprudence of this Court, thereby avoiding the " 'substantial variation' in rights and duties as a result of choice of forum that choice of law doctrine was designed to prevent." *Id.*

CONCLUSION

The Eleventh Circuit decision has created significant conflicts among the circuits which must be resolved by this Court. Specifically, we submit that this Court should resolve whether appellate review can be had of an order favoring arbitration *before* the parties engage in arbitration especially in light of the language of § 16 of the Act which prohibits it. We ask the Court to resolve whether a failure to make a pre-litigation demand for arbitration can, by itself, constitute a waiver of one's contractually guaranteed right to arbitrate. And we ask the Court to resolve whether state direct action statutes apply in admiralty cases as the procedure of the forum without consideration of choice of law rules, especially when to do so is to re-write a contract between citizens of other nations in a matter not affecting the forum state.

We submit that a writ of certiorari should be granted to resolve these important questions of law.

Respectfully submitted,

JOSEPH M. ALLEN, JR.
JOHNSTONE, ADAMS, BAILEY,
GORDON & HARRIS, L.L.C.
Post Office Box 1988
Mobile, Alabama 36633
(334) 432-7682
Counsel of Record for Petitioner

APPENDIX TABLE OF CONTENTS

		Page
A.	*Morewitz v. West of England*, 62 F.3d 1356 (11th Cir. 1995)	1a
B.	Order of United States District Court for the Southern District of Alabama, June 22, 1994, dismissing Respondent's action	22a
C.	Order of United States District Court for the Southern District of Alabama, December 10, 1993, granting Respondent 180 days to commence arbitration	26a
D.	Dismissal by Eleventh Circuit Court of Appeals of appeal of order staying litigation pending arbitration under § 3 of the Federal Arbitration Act for lack of appellate jurisdiction entered September 28, 1993	28a
E.	Order of the United States District Court for the Southern District of Alabama, April 13, 1992, staying litigation pending arbitration under § 3 of the Federal Arbitration Act	31a
F.	*Morewitz v. West of England*, 896 F.2d 495 (11th Cir. 1990), reversing June 29, 1988 order of United States District Court for the Southern District of Alabama	35a
G.	Order of United States District Court for the Southern District of Alabama, June 29, 1988, dismissing Respondent's complaint for lack of subject matter jurisdiction	51a
H.	Judgment of United States District Court for the Eastern District of Virginia, April 3, 1980	56a
I.	Memorandum Opinion of United States District Court for the Eastern District of Virginia, April 3, 1980	58a
J.	Order of United States District Court for the Eastern District of Virginia, March 26, 1979, granting Rule 37 sanction that General Development & Shipping Enterprises Co., Ltd. be considered as owner *pro hac vice*	74a

TABLE OF CONTENTS—Continued

		Page
K.	Order of United States District Court for the Eastern District of Virginia, January 30, 1979, substituting Stephen Morewitz as Plaintiff in the action styled *Ruth A. Morewitz v. Imbros Shipping Co., Ltd., et als.*	77a
L.	Federal Arbitration Act, 9 U.S.C.A. §§ 1-4, 16	80a
M.	Alabama Direct Action Statutes, *Ala. Code* §§ 27-23-1 and 27-23-2 (1975)	85a
N.	The British Third Parties (Rights Against Insurers) Act of 1930	87a
O.	Extracts of the Rules of The West of England Ship Owners Mutual Protection and Indemnity Association (Luxembourg)	90a

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 94-6650

STEPHEN J. MOREWITZ, as Administrator of the Estates of CHRISOS PASSALIS; CONSTANTINOS STAMATIS; GERASSIMOS MARKATOS; GEORGE MARANGOS; JESUS RAMOS MAYORQUIN; EFRAN ALVARADO MARTINEZ; and MUKHTAR AHMED, deceased,

Plaintiffs-Appellants,

v.

THE WEST OF ENGLAND SHIP OWNERS MUTUAL PROTECTION AND INDEMNITY ASSOCIATION (LUXEMBOURG),

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Alabama

Sept. 6, 1[illegible]

Before CARNES and BARKETT, Circuit Judges, and FLOYD R. GIBSON *, Senior Circuit Judge.

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* Honorable Floyd R. Gibson, Senior U.S. Circuit Judge for the Eighth Circuit Court of Appeals, sitting by designation.

FLOYD R. GIBSON, Senior Circuit Judge:

Stephen Morewitz,[1] as administrator for the estates of several of the crew members who were aboard the M/V IMBROS when it disappeared at sea, brought wrongful death actions against the vessel's owner and managing agent in the United States District Court for the Eastern District of Virginia. After obtaining a favorable judgment, Morewitz brought this action in the United States District Court for the Southern District of Alabama, seeking to enforce the judgment and recover on a maritime protection and indemnity policy issued by West of England Ship Owners Mutual Protection and Indemnity Association ("West of England").

The district court dismissed Morewitz's lawsuit for lack of subject matter jurisdiction, concluding that this action was not based on a marine insurance contract, but rather, on English bankruptcy statutes. We reversed and held that this case fell within the federal court's admiralty and maritime jurisdiction pursuant to 28 U.S.C. § 1333.[2] *Morewitz v. The West of Eng. Ship Owners Mut. Protection and Indemnity Ass'n (Lux.)*, 896 F.2d 495, 496 (11th Cir.1990) ("*Morewitz I*").

On remand, the district court granted West of England's motion to stay the proceedings pending arbitration. Morewitz appealed, and we dismissed for lack of jurisdiction because the district court's order was interlocutory and not subject to appeal. *Morewitz v. The West of Eng. Ship Owners Mut. Protection and Indemnity Ass'n (Lux.)*, 5 F.3d 1498 (11th Cir.1993) (unpublished) ("*Morewitz II*").

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[1] Stephen Morewitz succeeded Ruth Morewitz as the administrator for these estates.

[2] "The district courts shall have original jurisdiction, exclusive of the courts of the States, of . . . [a]ny civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled." 28 U.S.C. § 1333(1) (1988).

On remand again, Morewitz argued that the deceased crew members were not bound by the arbitration agreement and, alternatively, the West of England had waived its right to compel arbitration. Unpersuaded by Morewitz's arguments, the district court ordered that the parties had six months in which to demonstrate that they were proceeding with arbitration. Morewitz requested that the district court reconsider its stay order or certify the question for immediate appeal. The district court denied both of these motions. As a result of Morewitz's continued refusal to comply with the arbitration order, the district court dismissed this case with prejudice for want of prosecution.

Upon Morewitz's third appeal to this Court, the issues before us are whether the district court erred in ordering arbitration, and, if so, whether it was an abuse of discretion to dismiss Morewitz's case with prejudice for failure to comply with the arbitration order. Because we conclude that the district court erred in compelling arbitration, we VACATE the district court's order dismissing this action and REMAND for further proceedings consistent with this opinion.

I. BACKGROUND

A. Facts

On December 13, 1975, the M/V IMBROS loaded with cargo in Mobile, Alabama, and departed for Quebec, Canada. Three days into its voyage, the crew notified the vessel's managing agent about leakage in the salt water cooling system for the main engine gears. On December 18, the crew broadcast an SOS or "Mayday message" from international waters in the region known as the Bermuda Triangle. The M/V IMBROS disappeared at sea, and no trace of the ship, its cargo, or its eighteen crew members was ever found.

The M/V IMBROS was registered to Imbros Shipping Company, Limited, ("Imbros Shipping") and managed by

General Development & Shipping Company, Limited, ("General Development"). Both Imbros Shipping and General Development were Cypriot corporations owned by George Tsourinakis and his wife. West of England had issued a maritime protection and indemnity policy covering the M/V IMBROS, which was in force and effect at the time of the vessel's disappearance.

As part of the risks insured against, the West of England policy provided compensation for the loss of life of any person on board an insured vessel. Furthermore, according to Rule 64 of the West of England Ship Owners Mutual Protection and Indemnity Association:

> If any difference or dispute shall arise between an insured Owner . . . and the Association out of or in connection with these Rules or arising out of any contract between an insured Owner and the Association or as to the rights or obligations of the Association or the insured Owner thereunder or in connection therewith or as to any other matter whatsoever, such difference or dispute shall be referred to the arbitration in London of a sole legal Arbitrator. . . . The obtaining of an Arbitration Award as hereinbefore provided shall be a condition precedent to the right of any insured Owner to bring or maintain any action, suit or other legal proceedings against the Association in respect of any such difference or dispute.

The record indicates that during 1976 and 1977, West of England paid settlements in Greece to the families of at least seven of the M/V IMBROS crew members. In addition, Morewitz alleged that West of England reimbursed General Development of the loss of vessel and cargo by giving the company credits against its unpaid premiums or "calls."

Between 1976 and 1978, Morewitz brought wrongful death actions on behalf of seven of the deceased crew

members against Imbros Shipping and General Development. The United States District Court for the Eastern District of Virginia dismissed Imbros Shipping for lack of personal jurisdiction, but determined that it had personal jurisdiction over General Development. West of England retained counsel to defend this action both before and after the district court dismissed Imbros Shipping from the litigation.

Morewitz then argued that General Development was an alter ego for Imbros Shipping and that General Development had procured the West of England policy and was responsible for the premiums. Morewitz also claimed that, according to George Tsourinakis' deposition testimony, General Development exercised all incidents of ownership over the M/V IMBROS, effectively making General Development a "demise charter party." [3]

In attempts to establish the party responsible for the M/V IMBROS at the time of its disappearance, Morewitz submitted interrogatories to General Development, but the company refused to respond. As a sanction for General Development's failure to comply with the district court's discovery order, the court found General Development to be the owner *pro hac vice* of the M/V IMBROS at the time of the loss.[4]

The district court then determined that the M/V IMBROS was inadequately staffed and unseaworthy when it

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[3] "To create a demise the owner of the vessel must completely and exclusively relinquish 'possession, command, and navigation' thereof to the demisee. . . . It is therefore tantamount to, though just short of, an outright transfer of ownership." *Guzman v. Pichirilo*, 369 U.S. 698, 699-700, 82 S.Ct. 1095, 1096, 8 L.Ed.2d 205 (1962) (citations omitted).

[4] "If a party . . . fails . . . to serve answers or objections to interrogatories . . . the court in which the action is pending on motion may make such orders in regard to the failure as are just . . ." including an order preventing a disobedient party from opposing a designated claim. Fed.R.Civ.P. 37(b) and (d).

disappeared and that General Development was liable for the deaths of the vessel's crew members. On April 3, 1980, the district court entered judgment in favor of the decedents for a total of $459,456.36 in damages. General Development appealed, and the judgment was summarily affirmed by the Fourth Circuit Court of Appeals. *Morewitz v. General Dev. & Shipping Enters. Co., Ltd.*, 660 F.2d 491 (4th Cir.), *cert. denied*, 454 U.S. 939, 102 S.Ct. 474, 70 L.Ed.2d 246 (1981). At some point during the litigation in Virginia, General Development became insolvent and is now defunct. The judgment remains unpaid.

B. Procedural History

Morewitz registered the Virginia judgment in the United States District Court for the Southern District of Alabama.[5] On June 26, 1985, Morewitz filed the present lawsuit to enforce the judgment and recover proceeds under West of England's marine protection and indemnity policy that covered the M/V IMBROS at the time of its disappearance.

In the first incarnation of this litigation, Morewitz alleged that this suit was based on: (1) English bankruptcy statutes,[6] which created third party rights in favor of the decedents; and (2) a marine insurance contract, which fell within federal admiralty and maritime jurisdiction. West of England filed a motion to dismiss, arguing that the district court lacked subject matter jurisdiction.

Erroneously believing that it was constrained to characterize these proceedings either as a foreign bankruptcy or an admiralty action, the district court determined that

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[5] "A judgment so registered shall have the same effect as a judgment of the district court of the district where registered and may be enforced in like manner." 28 U.S.C. § 1963 (1988).

[6] For the text of The Third Parties (Rights Against Insurers) Act of 1930, see *Morewitz I*, 896 F.2d at 498 n. 3.

this suit was based on the English bankruptcy statutes. Consequently, the district court dismissed for lack of subject matter jurisdiction. *Morewitz I*, 896 F.2d at 498. This Court reversed, holding that "the subject matter of the suit is liability under a marine insurance policy, so the basis of [Morewitz's] case also is admiralty subject matter." *Id.* at 500.

On remand, Morewitz abandoned his argument that the English bankruptcy statutes applied, and instead, relied solely on the Alabama direct action statutes. Ala.Code §§ 27-23-1 and 27-23-2 (1975). As we stated in *Morewitz I*, direct action statutes "give a group of persons—those whose possible injury was the risk insured by the contract—direct standing to sue an insurer by putting them 'in the shoes' of the assured." 896 F.2d at 499.

On October 17, 1990, West of England filed a motion to stay the proceedings pending arbitration,[7] and on January 31, 1991, the district court granted West of England's motion. Morewitz then filed a motion for reconsideration and argued that West of England had waived any right that it may have had to compel arbitration. The district court denied Morewitz's motion, concluding that West of England was not in default for failing to make a pre-litigation demand for arbitration. After Morewitz's unsuccessful attempt to appeal the district court's order and his continued refusal to arbitrate, the district court dismissed this case with prejudice for want of prosecution. Morewitz appeals.

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[7] 9 U.S.C. § 3 (1988) provides:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending . . . shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

II. DISCUSSION

A. Jurisdiction

As a threshold matter, we address West of England's argument that this Court lacks jurisdiction to consider this appeal. Citing our decision in *Morewitz II*, West of England argues that "an appeal may not be taken from an interlocutory order . . . granting a stay of any action under section 3 of this title." 9 U.S.C. § 16(b)(1) (Supp. III 1991).

Pursuant to 28 U.S.C. § 1291 (1988), "[t]he court of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court." Decisions of the district court are final if they "end the litigation on the merits and leave nothing for the district court to do but execute the judgment." *Thomson McKinnon Sec., Inc. v. Salter*, 873 F.2d 1397, 1399 (11th Cir.1989) (quotation omitted). "A dismissal with prejudice clearly is a decision that ends the litigation on the merits and leaves nothing for the court to do but execute a judgment." *Nichols v. Mobile Bd. of Realtors, Inc.*, 675 F.2d 671, 673 (5th Cir. Unit B 1982) (quotations omitted).[8] We conclude that we have jurisdiction to hear this appeal.

Furthermore, we are guided by our decision in a case that was presented in the same procedural posture as the case at hand. State Establishment, the owner of the cargo that was destroyed during shipping, instituted a lawsuit against the vessel, the various corporations that managed the vessel and cargo, and the defendants' liability underwriter. *State Establishment for Agric. Prod. Trading v. M/V Wesermunde*, 838 F.2d 1576 (11th Cir.), *cert. denied*, 488 U.S. 916, 109 S.Ct. 273, 102 L.Ed.2d 262 (1988).[9] Upon the defendants' motion to have the dis-

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[8] Former Fifth Circuit case, Public Law 96-452 § 9(1)—October 14, 1980.

[9] The Supreme Court recently resolved a conflict between the Circuit Courts and held that foreign arbitration clauses in bills

pute referred to arbitration, the district court stayed the proceedings. *Id.* at 1579. State Establishment refused to arbitrate, and the district court dismissed the case with prejudice for failure to comply with the arbitration order. *Id.* at 1577.

Although we acknowledged the antiquated but viable admiralty law doctrine that there is no jurisdiction to hear an appeal from a district court's stay of admiralty proceedings pending arbitration, *Schoenamsgruber v. Hamburg Am. Line*, 294 U.S. 454, 457-58, 55 S.Ct. 475, 476-77, 79 L.Ed. 989 (1935), we concluded this predicament created a "Catch 22." *State Establishment*, 838 F.2d at 1579. State Establishment was being forced to expend substantial time, effort, and funds to comply with what was likely an erroneous arbitration order; yet, because of the *Schoenamsgruber* doctrine,[10] it was necessary to complete the arbitration process before the validity of the arbitration proceeding could be tested on appeal.

Faced with this dilemma, State Establishment, like Morewitz, believed that is was better to forego any damages it might potentially recover from the arbitration process in exchange for appealing the chance that the district court erred in ordering arbitration. *Id.* We noted, "[t]he inherent risk in taking such a position was, of course, that if the district court was correct in ordering arbitration, the dismissal with prejudice for failure to comply with that order would be affirmed by this court." *Id.* Fortunately for Morewitz, he has avoided this "inherent risk" because we disagree with the district court's order requiring the parties to arbitrate this dispute.

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of lading are not invalid under the Carriage of Goods by Sea Act. *Vimar Seguros Y Reaseguros, S.A., v. M/V SKY REEFER*, —— U.S. ——, 115 S.Ct. 2322, 132 L.Ed.2d 462 (1995).

[10] *See Coastal (Bermuda) Ltd. v. E.W. Saybolt & Co.*, 761 F.2d 198, 202-03 (11th Cir.1985) (discussing the origins of the *Schoenamsgruber* doctrine).

B. Direct Actions

1. *English Law*

On appeal, Morewitz concedes that attempting to arbitrate this dispute in England would be futile. In 1990, the House of Lords held that when the terms of an insurance policy require the insured to pay its obligation before it may collect against the insurer, the insured must pay before any other party can sue on the contract.[11] *Firma C-Trade S.A. v. Newcastle Protection and Indem. Ass'n*, 2 Lloyd's Rep. 191 (H.L. 1990). "Because under English law, such payment is a 'condition precedent' to a direct suit against the insurer, plaintiffs cannot proceed under English law." *Psarianos v. Standard Marine Ltd.*, 12 F.3d 461, 464 (5th Cir.) (footnote omitted), *cert. denied*, —— U.S. ——, 114 S.Ct. 2164, 128 L.Ed.2d 887 (1994).

2. *Alabama Statutes*

As we have noted, however, Morewitz is not seeking recourse under the English bankruptcy law, but rather, under the Alabama direct action statutes.[12] The Alabama

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[11] According to Rule 18 of the West of England Ship Owners Mutual Protection and Indemnity Association, "it shall be a condition precedent of an insured Owner's right to recover from the funds of the Association in respect of any liabilities, costs or expenses that he shall first have discharged or paid the same."

[12] Ala.Code §§ 27-23-1 and 27-23-2 (1975) provide:

> As to every contract of insurance made between an insurer and any insured by which such insured is insured against loss or damage on account of . . . death by accident of any person for which loss or damage such insured is responsible, whenever a loss occurs on account of a casualty covered by such contract of insurance, the liability of the insurer shall become absolute and the payment of the loss shall not depend upon the satisfaction by the insured of a final judgment against him for loss, or damage or death occasioned by the casualty. . . .
>
> Upon the recovery of a final judgment against any person, firm or corporation by any person, including administrators

direct action statutes state that recovery "shall not depend upon the satisfaction by the insured of a final judgment against him for loss." Ala.Code § 27-23-1.

3. *The Conflict*

Federal admiralty law neither authorizes nor forecloses a third party's right to directly sue an insurance company. *Steelmet, Inc. v. Caribe Towing Corp.*, 779 F.2d 1485, 1487 (11th Cir.1986), *modifying* 747 F.2d 689 (1984). "A state may, however, create a direct action against a maritime insurer, at least where the state action is not in conflict with any feature of substantive admiralty law or any remedy peculiar to admiralty jurisdiction." *Steelmet*, 779 F.2d at 1487; *see Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 320-21, 75 S.Ct. 368, 374, 99 L.Ed. 337 (1955) (in the absence of a controlling federal admiralty principle, state law can be applied in an admiralty case). The conflict in the present case lies not with federal admiralty law, but with whether the English bankruptcy statutes or the Alabama direct action statutes apply.

We recognize that characterizing direct action statutes as either procedural or substantive is problematic, particularly in the context of admiralty jurisdiction.[13] *See*

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or executors, for loss or damage on account of bodily injury, or death . . . if the defendant in such action was insured against the loss . . . at the time when the right of action arose, the judgment creditor shall be entitled to have the insurance money provided for in the contract of insurance between the insurer and the defendant applied to the satisfaction of the judgment, and . . . the judgment creditor may proceed against the defendant and the insurer to reach and apply the insurance money to the satisfaction of the judgment.

[13] The Restatement (Second) of Conflict of Laws § 122 cmt. b (1971), suggests that rather than classifying issues as "procedural" or "substantive," courts should directly face whether the forum's rule should be applied. *See Schoenberg v. Exportadora de Sal, S.A. de C.V.*, 930 F.2d 777, 782 (9th Cir.1991) (noting that federal common law follows the approach of the Restatement (Second) of Conflict of Laws).

State Trading Corp. of India v. Assuranceforeningen Skuld, 921 F.2d 409, 414-15 (2d Cir. 1990). "However, in order to promote orderly administration of justice and the integrity of courts' local rules, some laws are deemed procedural and not subject to choice of law rules." *Id.* at 416; *see also* Restatement (Second) of Conflict of Laws § 122 cmt. a (1971) (discussing a state's right to apply its own procedural law). Therefore, "[b]efore engaging in choice of law analysis, we first address [the] argument that [Alabama's] direct action statute is procedural and therefore not subject to choice of law rules." *State Trading*, 921 F.2d at 414.

In *Morewitz I*, we described direct action statutes as "remedial in character, rather than substantive." 896 F.2d at 499 (quotations omitted); *see also id.* at 501 (Tjoflat, J., concurring) (distinguishing that rather than mandating a direct action provision in every insurance contract, the English bankruptcy statute itself provided the right of action). We also noted that:

> Although it seems clear that English law would govern in construing the existence and amount of defendant's liability under the marine insurance contract, it is not as clear when the suit is being brought in Alabama, that English procedural law would apply. The cases we have reviewed, although not addressing the choice of law issue directly, indicate that the forum state's law may be the applicable law for purposes of applying any direct action statute. *See e.g., Maryland Casualty Co. v. Cushing*, 347 U.S. 409, 74 S.Ct. 608, 98 L.Ed. 806 (1954); *Steelmet, Inc. v. Caribe Towing Corp.*, 779 F.2d 1485 (11th Cir. 1986), *modifying* 747 F.2d 689 (1984).

896 F.2d at 499 n. 5 (additional citations omitted).

Moreover, in *Macey v. Crum*, 249 Ala. 249, 30 So.2d 666 (1947), the Supreme Court of Alabama held that its direct action statute "merely enables the person suffering the initial damages, out of which grows the loss to

the insured, to acquire a lien against the loss and the right to damages or indemnity arising under the policy, and to enforce it in his own name." *Id.* 30 So.2d at 668 (quotation omitted); *see also Fleming v. Pan American Fire & Cas. Co.* 495 F.2d 535, 539 (5th Cir. 1974)[14] (stating that Alabama's direct action statutes applied in a diversity case without regard to whether the insurance contract was made in Alabama or whether the named parties to the contract of insurance were residents or non-residents of Alabama); *but see State Trading*, 921 F.2d at 416 (concluding that the application of Connecticut's direct action statute would be inappropriate under the circumstances).

In summary, the Alabama direct action statutes mandate a direct action provision into every insurance contract and create a method of executing upon the proceeds of the insurance policy. Accordingly, we look to Alabama law in determining the manner in which this suit by Morewitz, the judgment creditor, against West of England, the judgment debtor's insurer, should proceed.

C. Arbitration

1. *Alabama Law*

" 'Under Alabama law, the injured party acquires a vested interest (secondary) in the nature of a hypothecation of the insured's rights under the policy.' " *Haston v. Transamerica Ins. Servs.*, No. 1930872, 1995 WL 217854, at *2, —— So.2d ——, —— (Ala. Apr. 14, 1995) (quoting *Maness v. Alabama Farm Bureau Mut. Casualty Ins. Co.*, 416 So.2d 979, 981-82 (Ala.1982)). The injured party, however, cannot bring an action against the insurer until he has recovered a judgment

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[14] Pursuant to *Bonner v. City of Prichard, Ala.*, 661 F.2d 1206 (11th Cir.1981) (en banc), decisions of the former Fifth Circuit entered prior to the split establishing the Eleventh Circuit are binding on the Eleventh Circuit.

against the insured. *Id.* Furthermore, the injured party's 'vested interest' is subject to the qualification that 'the terms of the policy imposing obligations on the insured are effective as against the injured party.' " *Id.* (quoting *George v. Employers' Liab. Assurance Corp.*, 219 Ala. 307, 122 So. 175, 177 (1929).) In other words, any defenses that are available to the insurer in an action brought by the insured would also be available to the insurer in a direct action brought by the injured party. *Id.*

Consequently, under Alabama law, West of England is able to assert any defenses that would have been available to it as if the present action had been brought by General Development. Arbitration is clearly an affirmative defense that would have been available to West of England in an action brought by General Development. *See American Sugar Refining Co. v. The Anaconda*, 138 F.2d 765, 767 (5th Cir.) (the Federal Arbitration Act recognizes arbitration agreements as affirmative defenses), *cert. granted*, 321 U.S. 758, 64 S.Ct. 620, 88 L.Ed. 1057 (1943), *aff'd*, 322 U.S. 42, 64 S.Ct. 863, 88 L.Ed. 1117 (1944). Therefore, unless the arbitration provision does not apply to these claimants or West of England has waived its right to compel arbitration, Morewitz is bound by the terms of the arbitration agreement between General Development and West of England.

2. *The Federal Arbitration Act*

As we have noted, a dispute arising under a contract of maritime insurance, such as the one involved here, is within the admiralty and maritime jurisdiction of the district court. The fact that Morewitz dervies his standing to proceed with this case from the Alabama direct action statutes does not vitiate that jurisdiction. *See Morewitz I*, 896 F.2d at 499-500 and n. 5.

The issue of arbitrability under the United States Arbitration Act is a matter of federal substantive law. *Prima*

Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 402-05, 87 S.Ct. 1801, 1806-07, 18 L.Ed.2d 1270 (1967); *Miller Brewing Co. v. Fort Worth Distributing Co.*, 781 F.2d 494, 497 n. 4 (5th Cir.1986) (rejecting the appellee's citation to Texas law on the issue of whether it had waived the right to compel arbitration). Therefore, federal law comprising generally accepted principles of contract law controls the question of arbitrability.

According to the Federal Arbitration Act of 1952, 9 U.S.C. § 2 (1988), "[a] written provision in any maritime transaction . . . to settle by arbitration a controversy thereafter arising out of such contract or transaction" is an enforceable arbitration agreement. Nevertheless, the Act does not require parties to arbitrate when they have not agreed to do so. "It simply requires courts to enforce privately negotiated agreements to aribtrate, like other contracts, in accordance with their terms." *Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478, 109 S.Ct. 1248, 1255, 103 L.Ed.2d 488 (1989). We have acknowledged that "[t]he purpose of the Federal Arbitration Act was to relieve congestion in the courts and to provide parties with an alternative method for dispute resolution that would be speedier and less costly than litigation." *Ultracashmere House Ltd. v. Meyer*, 664 F.2d 1176, 1179 (11th Cir.1981).

3. *Application*

The arbitration agreement in Rule 64 of the West of England Ship Owners Mutual Protection and Indemnity Association applies between "owners" and the "association." Relying on the specific terms of this provision, Morewitz argues that the deceased crew members were not "owners." Morewitz also argues that the deceased crew members were not parties to the arbitration agreement and that they should not be bound by it. Notwithstanding our prior discussion that any defenses that would

have been available to West of England in an action brought by General Development would also be available to West of England in a direct action brought by the deceased crew members, the cases discussed below favor both of Morewitz's arguments.

First, in *Ocean Eagle—Limitations Proceedings,* 1974 AMC 1629 (D.P.R.), a tanker sank and spilled crude oil into the waters of San Juan Harbor. Numerous claimants brought direct actions suits against the vessel, the owners, and the insurance association. Upon the insurance association's motion for a stay pending arbitration in London, the court noted that "the injured third-party beneficiary of the contract is not a party to the contract . . . this is recognized by the limiting language of the arbitration clause which applies to a dispute between a 'member' and the 'association.'" *Id.* at 1633. Moreover, the court found that the right of action conferred by the Puerto Rico direct action statute was totally independent of the contractual terms binding the insured and the insurer, which the insurer could not abrogate by private agreement.

Second, in the case of *In re Talbott Big Foot, Inc.*, 887 F.2d 611 (5th Cir.1989), workers who were injured on a drilling barge filed claims against the drilling company's protection and indemnity insurer under Louisiana's direct action statute.[15] Based on the policy provision requiring the insurer and insured to arbitrate coverage disputes, the insurer filed a motion to stay the proceedings pending arbitration, and the district court dismissed the

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[15] Analogous to the Alabama direct action statutes, Louisiana's direct action statute provides that actions are subject to all of the lawful conditions of the policy or contract and the defenses that could be urged by the insurer in a direct action brought by the insured. *Talbott,* 887 F.2d at 612-13. However, unlike the Alabama statutes, the recovery of a judgment against the insured is not a condition precedent to the bringing of a direct action under Louisiana law. *Id.*

action. *Id.* at 612. On appeal, the Fifth Circuit recognized that despite a strong federal policy favoring arbitration, the Act does not require arbitration unless the parties to a dispute have agreed to refer it to arbitration. *Id.* at 614. As the Fifth Circuit aptly stated, "[w]e are unaware of any federal policy that favors arbitration for parties who have not contractually bound themselves to arbitrate their disputes." *Id.*

Although we recognize that Morewitz now "stands in the shoes" of General Development, we are reluctant to mandate arbitration where the claimants clearly did not bargain to do so. *Cf. AT & T Technologies v. Communications Workers of Am.*, 475 U.S. 643, 648-49, 106 S.Ct. 1415, 1418-19, 89 L.Ed.2d 648 (1986) (stating that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit. . . . [A]rbitrators derive their authority to resolve disputes only because *the parties have agreed in advance* to submit such grievances to arbitration.") (emphasis added and quotation omitted)); *Wheat, First Securities, Inc. v. Green*, 993 F.2d 814, 821 (11th Cir.1993) (affirming the district court's holding that a securities broker-dealer that purchased another company's assets was not an assignee of or successor to the customer agreements that contained an arbitration provision); *Goldberg v. Bear, Stearns & Co.*, 912 F.2d 1418, 1419 (11th Cir.1990) (stating that despite a presumption in favor of arbitration, the parties will not be required to arbitrate when they have not agreed to do so).

In light of the cases discussed above, we question whether the arbitration clause in the policy between West of England and General Development applies to the deceased crew members. Moreover, even assuming that the arbitration clause applies, we conclude that West of England has waived any right that it may have had to compel arbitration.

4. *Waiver*

Morewitz bases his waiver argument on West of England's participation in the litigation in the United States District Court for the Eastern District of Virginia. Although Morewitz concedes that West of England was not a party to the Virginia litigation, he argues that rather than challenging coverage when this litigation was commenced, West of England unsuccessfully defended General Development's liability. Essentially, Morewitz argues that West of England should be bound by its failure to arbitrate with General Development when this dispute arose.

Arbitration should not be compelled when the party who seeks to compel arbitration has waived that right.[16] In considering the issue of waiver, we are mindful of the Supreme Court's admonition that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S.Ct. 927, 941, 74 L.Ed.2d 765 (1983).

Nevertheless, the doctrine of waiver is not an empty shell. Waiver occurs when a party seeking arbitration substantially participates in litigation to a point inconsistent with an intent to arbitrate and this participation results in prejudice to the opposing party. *Price v. Drexel Burnham Lambert, Inc.*, 791 F.2d 1156, 1158 (5th Cir. 1986). Prejudice has been found in situations where the party seeking arbitration allows the opposing party to undergo the types of litigation expenses that arbitration was designed to alleviate. *E.C. Ernst, Inc. v. Manhattan Constr. Co.*, 559 F.2d 268, 269 (5th Cir.1977), *cert. denied*, 434 U.S. 1067, 98 S.Ct. 1246, 55 L.Ed.2d 769 (1978).

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[16] Although the Arbitration Act uses the term "default," 9 U.S.C. § 3, the case law on this subject employs the term "waiver." *See generally* 3 Fed.Proc., L.Ed. *Arbitration* § 4.24 (1981) ("the term 'default' has been construed as analogous in meaning to the common-law term 'waiver' ").

Applying these considerations to the facts in this case, it is apparent to this Court that West of England has waived its right to compel arbitration. During the Virginia litigation, there were disputes between West of England and General Development over the ownership of the M/V IMBROS and over General Development's failure to assist with its defense. West of England was apprised of the significant monetary claims that were being pursued against General Development both in the United States and abroad, but never made a demand to arbitrate its coverage of the M/V IMBROS. Although the court in *Tenneco Resins, Inc. v. Davy Intern., AG*, 770 F.2d 416, 419 (5th Cir.1985), noted that a party is not obligated to make a presuit demand for arbitration, we do not believe that an insurer should be permitted to collude with its insured to the detriment of the injured third-party.

In light of the strong federal policy favoring arbitration, we also must examine whether Morewitz has been prejudiced by West of England's delay in demanding arbitration. The House of Lords decision affecting Morewitz's right to arbitrate this dispute in England was not announced until nearly a decade after the Fourth Circuit affirmed General Development's liability for the crew members' deaths. *Firma C-Trade S.A. v. Newcastle Protection and Indem. Ass'n*, 2 Lloyd's Rep. 191 (H.L.1990). Moreover, Morewitz instituted the present lawsuit in 1985, five years before the decision from the House of Lords. We conclude that West of England had ample opportunity to demand arbitration well in advance of the decision that significantly changed the legal position of the parties to the prejudice of Morewitz.

In short, the appropriate time for West of England to contest coverage and demand arbitration with General Development was during the proceedings in the United States District Court for the Eastern District of Virginia. Because West of England has waived its right to arbitrate

with General Development, it has also waived its right to demand arbitration with Morewitz.

D. Dismissal with Prejudice

We review the district court's decision to dismiss a case for want of prosecution for abuse of discretion. *See State Establishment*, 838 F.2d at 1582. "The severe sanction of dismissal with prejudice, however, can be imposed only in the face of a clear record of delay or contumacious conduct by the plaintiff." *Id.* (quotation omitted). Dismissal with prejudice is a sanction of last resort that is to be utilized only in extreme situations. *Id.*

As in the *State Establishment* case, Morewitz made a conscious decision that an unsuccessful appeal would mean that the merits of this claim would never be reached. *Id.* at 1582-83 and n. 3. Morewitz requested that the district court certify the arbitration question to this Court prior to dismissing the action, and the district court denied this motion. In *State Establishment*, we found that the district court abused its discretion by dismissing a lawsuit with prejudice under the same circumstances. *Id.* Likewise, we conclude that the district court abused its discretion by dismissing this action with prejudice.[17]

III. CONCLUSION

Therefore, we REVERSE the decision of the district court requiring arbitration, VACATE the order dismissing Morewitz's action with prejudice, and REMAND the case to the district court for further proceedings.

CARNES, Circuit Judge, concurring:

I concur in the result and in all of the majority opinion except Part II.C.3, on pp. 1364-65. As to that particular part of the opinion, I join only the last sentence, which

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[17] In light of our decision, West of England's motion for double costs and attorney's fees is denied.

concludes that West of England waived any right it may have had to compel arbitration. Because of that waiver, there is no need to speculate as to whether the arbitration provision would have applied had there been no waiver; all such speculation is merely dicta, better left to the law reviews.

APPENDIX B

[Filed Jun. 22, 1994]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 85-0855

STEPHEN J. MOREWITZ, as administrator of the Estates of CHRISOS PASSALIS; CONSTANTINOS STAMATIS; GERASSIMOS MARKATOS; GEORGE MARANGOS; JESUS RAMOS MAYORQUIN; EFRAN ALVARADO MARTINEZ and MUKHTAR AHMED, Deceased,

Plaintiffs,

VS.

THE WEST OF ENGLAND SHIP OWNERS MUTUAL PROTECTION AND INDEMNITY ASSOCIATION (LUXEMBOURG),

Defendant.

ORDER

This order comes pursuant to opinions issued by this Court December 10, 1993 and April 12, 1994. In those orders the Court gave the parties until June 10, 1994 to show that the case was proceeding with arbitration or face dismissal. Previously the Court stayed the case pending arbitration.

In response to those orders, Plaintiff filed a motion for relief from the stay, arguing that Plaintiff is not bound by the arbitration agreement, that Defendant waived any right to arbitration, and that Alabama law should apply to collection of the judgment from a previous case. In the alternative, Plaintiff asked this Court to certify the

questions of arbitration and choice of law to the Eleventh Circuit Court of Appeals.

FACTS & PROCEDURAL HISTORY

This case stems from the unexplained loss of the M/V IMBROS with all hands in 1975 near Bermuda. The 300 foot vesel was carrying almost 30,000 railroad ties from Mobile, Alabama to Port Cartier, Quebec, Canada. In a resulting suit in Virginia, the vessel's owner, Imbros Shipping was dismissed on jurisdictional grounds, while the ship's managing agent, General Development & Shipping Enterprises (GDSE) remained a defendant in the case. A judgment for $459,456.36 (interest at 8% per anum) plus costs was entered against GDSE in the U.S. District Court for the Eastern District of Virginia on April 3, 1980.

Plaintiff brought suit in 1985 in Mobile against GDSEs insurance carrier, West of England, to recover the judgment. West of England's motion to dismiss was granted by this Court on the grounds that the suit was not in admiralty, but based on British bankruptcy law. On appeal the Eleventh Circuit reversed, holding that the case fell under the court's federal admiralty jurisdiction. *Morewitz v. West of England,* 896 F.2d 495 (11th Cir. 1990).

West of England then argued before this Court that under the terms of the insurance contract, the case was subject to arbitration. In April of 1992 this Court agreed and stayed the case pending arbitration. Plaintiff's appeal of the stay pending arbitration was dismissed by the Eleventh Circuit for lack of jurisdiction. *Morewitz v. West of England,* No. 92-6432, (11th Cir. Sept. 28, 1993). The appeals court found that the stay was not a final order under the Federal Arbitration Act (9 U.S.C. § 1 et seq.) and therefore was not appealable.

From there the case returned to this Court with the stay pending arbitration still in effect. By December of

1993, arbitration had not yet begun, and the Court gave the parties six months to show that they were proceeding with arbitration or be dismised.

That time having passed, and arbitration still not begun, the Court must dismiss the case for Plaintiff's failure to prosecute.

Plaintiff's arguments that he is not bound by the arbitration agreement and that Defendant waived its right to arbitration have already been addressed in prior orders. Because arbitration is still in effect, Plaintiff's contention that the Alabama law of judgments should apply is improper.

Finally Plaintiff's request that the Court certify the arbitration question to the court of appeals is not due to be granted. Under 28 U.S.C. § 1292(b) the district court may certify a controlling issue of law upon which there is substantial disagreement and the appeal of which will materially advance the litigation. The Court determines that there is no substantial disagreement on the legal question of arbitration. Furthermore, this dismissal gives Plaintiff the right to proceed with appeal and offer all arguments to the Eleventh Circuit. Therefore, the Court denies Plaintiff's request for certification of the issue.

For the reasons stated above, the above styled case is DISMISSED with prejudice.

DONE this the 22nd day of June, 1994.

/s/ Daniel H. Thomas
DANIEL H. THOMAS
Senior United States District Judge

[Filed Jun. 22, 1994]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 85-0855

STEPHEN J. MOREWITZ, as administrator of the Estates of CHRISOS PASSALIS CONSTANTINOS STAMATIS; GERASSIMOS MARKATOS; GEORGE MARANGOS; JESUS RAMOS MAYORQUIN; EFRAN ALVARADO MARTINEZ and MUKHTAR AHMED, Deceased

Plaintiffs,

VS.

THE WEST OF ENGLAND SHIP OWNERS MUTUAL PROTECTION AND INDEMNITY ASSOCIATION (LUXEMBOURG),

Defendant.

JUDGMENT

Pursuant to an order entered this same day, the above styled case is dismised with prejudice and the clerk ordered to close the case.

DONE this the 22nd day of June, 1994.

/s/ Daniel H. Thomas
DANIEL H. THOMAS
Senior United States District Judge

[Judgment Entered on Docket June 27, 1994]

APPENDIX C

[Filed Dec. 10, 1993]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 85-0855

STEPHEN J. MOREWITZ, as administrator of the Estates of CHRISOS PASSALIS; CONSTANTINOS STAMATIS; GERASSIMOS MARKATOS; GEORGE MARANGOS; JESUS RAMOS MAYORQUIN; EFRAN ALVARADO MARTINEZ and MUKHTAR AHMED, Deceased,

Plaintiffs,

VS.

THE WEST OF ENGLAND SHIP OWNERS MUTUAL PROTECTION and INDEMNITY ASSOCIATION (LUXEMBOURG),

Defendant.

ORDER

This order comes pursuant an opinion issued in the above styled case on September 28, 1993 by the United States Court of Appeals for the Eleventh Circuit (No. 92-6432).

In that opinion the Eleventh Circuit found that it lacked jurisdiction to hear an appeal of this Court's order staying the proceedings pending arbitration. Therefore this Court's order of April 13, 1992 stands. The parties have 180 days to show cause that they are proceeding with arbitration or be dismised.

DONE this the 10th day of December, 1993.

/s/ Daniel H. Thomas
DANIEL H. THOMAS
Senior United States District Judge

APPENDIX D

[Filed Sep. 28, 1993]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 92-6432

D. C. Docket No. 95-0855-T-C

STEPHEN J. MOREWITZ, as Administrator of the Estates of CHRISOS PASSALIS; CONSTANTINOS STAMATIS; GERASSIMOS MARKATOS; GEORGE MARANGOS; JESUS RAMOS MAYORQUIN; EFRAN ALVARADO MARTINEZ and MUKHTAR AHMED, Deceased,

Plaintiffs-Appellants,

versus

THE WEST OF ENGLAND SHIP OWNERS MUTUAL PROTECTION and INDEMNITY ASSOCIATION (LUXEMBOURG),

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Alabama

(September 28, 1993)

Before BIRCH, DUBINA and BLACK, Circuit Judges.

PER CURIAM:

This is an appeal from the district court's order granting Appellee The West of England Ship Owners Mutual Protection and Indemnity Association's motion to stay the proceedings pending arbitration.[1] The district court ruled that, because the suit falls within its admiralty jurisdiction, *see Morewitz v. West of England Ship Owners Mutual Protection & Indemnity Association*, 896 F.2d 495 (11th Cir. 1990), the Federal Arbitration Act (FAA) applies to this case. When Appellant Morewitz appealed, this court *sua sponte* raised the question of whether an order to stay proceedings pending arbitration is a final order subject to appeal, and thereby within this Court's jurisdiction. Upon consideration of the jurisdictional question, we hold that this Court has no jurisdiction because the district court's order is not final and not subject to appeal.

Section 16 of the FAA, enacted as part of the 1988 Judicial Improvements and Access to Justice Act, provides the right to appeal from "a final decision with respect to an arbitration that is subject to [the FAA]," 9 U.S.C. § 16(a)(3), but prohibits appeal "from an interlocutory order granting a stay of any action under section 3 of [the FAA]," *id.* § 16(b)(1). The district court's order granted a stay under § 3 of the FAA. By its clear terms, the statute defines an order filed under § 3 as an interlocutory order from which an appeal may not be taken. 9 U.S.C. § 16(b)(1); *see also Thomson McKinnon Sec., Inc. v. Salter*, 873 F.2d 1397, 1399 (11th Cir. 1989) (noting that district court decisions are final if they "end[] the litigation on the merits and leave[] nothing for the [district] court to do but execute the judgment") (quoting *Catlin v. U.S.*, 324 U.S. 229, 233 (1945)).

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[1] The Appellee's Motion to Strike "Appellants' Reply to Jurisdictional Question" is denied.

In addition, the arbitration order is a part of the overall action on the marine insurance contract. That is, the arbitration motion was not before the district court as an independent action brought solely to test whether the claim was subject to arbitration. Instead, it arose "in an ordinary action in a U.S. district court." 9 U.S.C.A. § 16, Practice Commentary at 253.

For the foregoing reasons, the district court's order staying the proceedings pending arbitration is not final and is not subject to appeal. Accordingly, this Court has no jurisdiction and the appeal is

DISMISSED.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

C.A. 85-0855-T

STEPHEN J. MOREWITZ, as administrator, et al.,
Plaintiffs,

VS.

THE WEST OF ENGLAND SHIP OWNERS MUTUAL PROTECTION AND INDEMNITY ASSOCIATION (LUXEMBOURG),
Defendant.

ORDER

In 1975, the vesel IMBROS was lost in international waters while on a voyage from Mobile, Alabama to Canada. As a result of this incident, plaintiffs filed a wrongful death suit in 1976 in the Eastern District of Virginia. Plaintiffs named various defendants including the vessel's owner Imbros Shipping and General Development & Shipping Enterprises (GDSE), the managing agent of the IMBROS. The Virginia court subsequently dismissed Imbros Shipping on jurisdictional grounds. GDSE however, remained a defendant in the Virginia suit. As a result of GDSE failing to respond to various discovery requests, the Virginia court entered an order directing that GDSE be treated as the owner, *pro hac vice*, of the IMBROS. Judgment was later entered against GDSE in the Virginia suit.

West of England was never named as a defendant in the Virginia suit. West of England was simply the insurer of Imbros Shipping, the defendant that was previously dismissed. Also, West of England provided counsel to GDSE to defend the Virginia suit.

On June 26, 1985, plaintiffs filed this suit in the Southern District of Alabama to recover under the contract of insurance issued by West of England. This case was dismissed on June 28, 1988, the Court citing a lack of subject matter jurisdiction. Pursuant to an appeal filed by plaintiffs, the Eleventh Circuit found that this Court did have jurisdiction of the present action. *Morewitz v. West of England Ship Owners Mut.*, 896 F.2d 495, 496. As a result, on October 17, 1990, the defendant filed a motion to stay this cause pending arbitration.

On January 31, 1991, this Court granted defendant's motion to stay these proceedings. The plaintiffs filed a motion to reconsider on February 8, 1991, and a motion for leave to serve discovery on February 19, 1991. After considering these motions and defendant's objections, the Court granted the plaintiffs' motion for leave to serve discovery. Specifically, the Court gave plaintiffs 90 days to complete the discovery on the issue of whether the defendant waived the right to arbitration. Upon later motion by the plaintiffs, the Court granted an extra 60 days to further complete discovery.

This matter is now before the Court to definitively determine whether the defendant waived its right to arbitration. The Court heard oral argument on this issue, on April 1, 1992. After hearing oral argument and carefully considering the parties' briefs, the Court finds the defendant did not waive its right to demand arbitration.

Plaintiffs state that because West of England failed to demand arbitration before, during, or after the Virginia suit and then failed to make a demand before the filing of the instant suit, a waiver of the arbitration right occur-

red. The Court does not agree. The plaintiffs argue that the defendant should be treated as a named defendant in the Virginia suit. In essence, that because it provided counsel to GDSE in Virginia, West of England was the alter ego of GDSE and had to demand arbitration at that time. The problem with the plaintiffs' argument is the nature of the Virginia suit. That suit was a wrongful death action against the named defendants. This put no burden on West of England to interject itself into the Virginia action and initiate a demand for arbitration.

Based on the plaintiff's complaint and the Eleventh Circuit ruling, the suit now pending before this Court is based on a contract of marine insurance. Since the plaintiffs claim to be successors in interest to the original insured, the Court finds that the provisions and rules governing the insurance policy in this case, are binding on plaintiffs. The issue thus becomes whether defendant had a duty to make a pre-suit demand for arbitration. Based on relevant case law, the Court finds defendant was under no such duty.

Since this suit is based on a contract of marine insurance and it is within the Court's admiralty jurisdiction, the Federal Arbitration Act applies. This Act places no burden on the defendant to make a pre-suit demand for arbitration. 9 U.S.C. § 3. The Act states, ". . . the Court . . . shall on application of one of the parties stay the trial of such action until such arbitration has been had in accordance with the agreement. . . ." *Id.* Since the statute is silent on the issue, the Court must examine the relevant case law to answer the question.

Defendant correctly points to a Fifth Circuit case that indeed, answers the question. In *Tenneco Resins, Inc., v. Davey Intern., AG,* 770 F.2d 416, 419 (5th Cir. 1985), the court cited its own 1970 decision and stated, "it is not necessary that the party moving for a stay of proceedings have made a pre-suit demand for arbitration." The 1970

Fifth Circuit decision, binding on this Court, sufficiently addresses the necessity of a pre-suit demand.

The Court finds that defendants acted properly in making a demand for arbitration on October 17, 1990. No earlier demand was required since this Court dismissed this action and an appeal was filed with the Eleventh Circuit. Therefore, the Court must refer this matter to arbitration. *Dean Witter Reynolds, Inc., v. Byrd,* 470 U.S. 231 (1985). Defendant's motion to stay these proceedings pending arbitration is GRANTED.

DONE this 13th day of April, 1992.

-/s/ Daniel H. Thomas
DANIEL H. THOMAS
Senior United States District Judge

APPENDIX F

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 87-7497

STEPHEN J. MOREWITZ, as Administrator of the estates of CHRISTOS PASSALIS, CONSTANTINOS STAMATIS, GERASSIMOS MARKATOS, GEORG MARANGOS, JESUS RAMOS MAYORQUIN, EFRAN ALVARADO MARTINEZ, and MUKHTAR AHMED, Deceased,

Plaintiff-Appellant,

v.

THE WEST OF ENGLAND SHIP OWNERS MUTUAL PROTECTION AND INDEMNITY ASSOCIATION (LUXEMBOURG),

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Alabama

March 13, 1990

Before TJOFLAT, Chief Judge, JOHNSON, Circuit Judge, and ESCHBACH *, Senior Circuit Judge.

ESCHBACH, Senior Circuit Judge:

Plaintiff-Appellant, Stephen J. Morewitz, administrator of the estates of several deceased seamen, filed this action in federal district court seeking to recover on a marine

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* The Honorable Jesse E. Eschbach, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

protection and indemnity policy issued by the defendant-appellee, The West of England Ship Owners Mutual Protection and Indemnity Association ("West of England"), a Luxembourg corporation. The deceased seamen, all foreign nationals, were crew members of the M/V IMBROS which sank in international waters off Bermuda in December 1975, and which was covered at the time of its sinking by an insurance policy issued by West of England. West of England is a mutual insurance association engaged in the business of providing marine protection and indemnity insurance to owners and operators of vessels. The district court dismissed this action, without prejudice, for lack of subject matter jurisdiction. The court held that this was not a suit on a marine insurance contract, but rather an action based on a British bankruptcy statute. Plaintiff then filed a motion for reconsideration of the dismissal order, which the court denied.

From the denial of his motion for reconsideration and the court's dismissal of this action, the administrator now appeals. First, he argues that the court had subject matter jurisdiction of this action because this is a suit to execute a judgment rendered in the District Court for the Eastern District of Virginia, which he registered in the Southern District of Alabama under 28 U.S.C. § 1963. Second, appellant contends that the court had subject matter jurisdiction because this is a suit on a marine insurance contract, which falls under our federal admiralty jurisdiction. Finally, appellant asserts that the court erred in deciding a factual issue without hearing evidence on the merits. For the reasons stated below, we reverse the district court's dismissal of the action for lack of subject matter jurisdiction because we disagree with its determination that this is not a suit on a marine insurance contract.

I.

This action arises out of the sinking of the M/V IMBROS, with the death of all crew members, somewhere off Bermuda in December 1975. Carrying a cargo of rail-

road ties, the ship was en route from Mobile, Alabama to Port Cartier, Quebec, Canada. Morewitz, the appointed administrator of the estates of the deceased crewmen, brought a wrongful death action against the vessel owner of record, Imbros Shipping Company, Limited ("Imbros Shipping"), a Cypriot corporation, and against the vessel's managing agent, General Development & Shipping Enterprises Company, Limited ("General Development"), a Cypriot corporation, in the United States District Court for the Eastern District of Virginia. The court dismissed Imbros Shipping as a party to the suit prior to trial for lack of personal jurisdiction. The court, however, determined that it had personal jurisdiction over General Development. Since General Development had failed to respond to the court's discovery orders, the court, pursuant to Rule 37(d) of the Federal Rules of Civil Procedure, found it to be the owner *pro hac vice* of the ship at the time of the loss. The court then determined that General Development was liable for the deaths of the ship's crew members. On April 3, 1980, the court entered a judgment against General Development for damages in the amount of $459,456.36. General Development appealed, and the Fourth Circuit Court of Appeals affirmed the judgment. 660 F.2d 491 (4th Cir.1981). Subsequently, General Development became insolvent, and the judgment remains unpaid.

On June 26, 1985, plaintiff filed this suit in federal district court against West of England seeking both to recover proceeds under a marine insurance policy that West of England had issued and to enforce the judgment entered by the United States District Court for the Eastern District of Virginia which was registered in the Southern District of Alabama under 28 U.S.C. § 1963. In 1975, West of England had issued a marine protection and indemnity policy covering the M/V IMBROS. The policy was in full force and effect at the time of the vessel's sinking in December 1975.

On August 28, 1985, West of England filed a motion to dismiss on several grounds, including that the court lacked subject matter jurisdiction over plaintiff's complaint. The court denied this motion. Apparently, the defendant filed another motion to dismiss or orally revived its earlier motion because the court held a hearing on the motion to dismiss on February 21, 1986.[1] Shortly thereafter, Morewtiz registered a certified copy of the judgment entered by the United States District Court for the Eastern District of Virginia in the District Court for the Southern District of Alabama. In addition to filing a brief in opposition to defendant's motion to dismiss, on March 28, 1986, Morewitz filed an amended complaint.

In his amended complaint, Morewitz alleges that this is an action on a marine insurance contract, which falls under the federal admiralty and maritime jurisdiction pursuant to 28 U.S.C. § 1333. He further alleges that General Development procured the certificate of insurance from defendant to insure "against losses which might be sustained by reason of claims and judgments for personal injuries and death occurring aboard" the M/V IMBROS. Plaintiff's Amended Complaint, Rec. 25, at 4. The defendant then refiled its motion to dismiss, on April 3, 1986, arguing that the court lacked subject matter jurisdiction over the action.

On May 19, 1988, the district court held a hearing on defendant's motion to dismiss the action. Subsequently, on June 29, 1988, the court dismissed, without prejudice, this action pursuant to Federal Rule of Civil Procedure 12(b)(1). First, the court held that rather than being an action on a marine insurance contract, this suit is based

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[1] Neither the record nor the docket sheet contains any reference to the filing of a second motion to dismiss. Based on the memoranda submitted in support of it and the transcript from the district court's hearing on the issue, we presume that the grounds alleged in the second motion to dismiss were the same as those asserted in the first motion to dismiss.

on a British bankruptcy statute. Second, the court ruled that jurisdiction did not exist pursuant to 28 U.S.C. § 1963 because plaintiff is seeking to assert a new cause of action against an entity that was not a party to the action in the Virginia suit. Plaintiff then filed a motion for reconsideration of the court's order dismissing the action for lack of subject matter jurisdiction, which the court denied on July 7, 1988.

II.

Morewitz now appeals from the district court's dismissal of this action for lack of subject matter jurisdiction. He contends that the district court had subject matter jurisdiction over this dispute because this is a suit on a marine insurance policy which falls under our federal admiralty jurisdiction pursuant to 28 U.S.C. § 1333.[2] He concedes that the deceased seamen were not named insureds under the insurance policy, but argues that this fact is irrelevant for purposes of determining subject matter jurisdiction. In rebuttal, West of England asserts that this fact is relevant. According to West of England the deceased seamen were neither parties to the insurance contract nor third party beneficiaries of it and, therefore, invocation of admiralty jurisdiction on the basis that the suit is one on a marine insurance contract is improper. The deceased seamen are allegedly suing under rights created by an English bankruptcy statute, The Third Parties (Rights Against Insurers) Act of 1930.[3] Thus, ar-

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[2] The statute, in relevant part, provides, "The district courts shall have original jurisdiction, exclusive of the courts of the States, of . . . [a]ny civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled." 28 U.S.C. § 1333(1).

[3] Section one of this Act provides:

1. Rights of third parties against insurers on bankruptcy, etc., of the insured

gues West of England, this case involves something other than admiralty.

In its order dismissing this action, the court concluded that the basis of the plaintiff's complaint was the English statute. The court noted that the plaintff alleged in his complaint that English law governs this dispute, and that he attached a copy of the text of the English statute to the complaint. The court quoted from a portion of the plaintiff's complaint in which he alleged that because a receiver had been appointed over General Development's assets in Cyprus, "its rights to indemnity under the said contract of insurance with the Defendant have become vested in the Plaintiff, who now has standing to sue the Defendant under the above-mentioned provisions of said statute." Plaintiff's Amended Complaint, Rec. 25, at 7. From this, the court concluded that "it is clear that the plaintiff's action is based on a British bankruptcy statute

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(1) Where under any contract of insurance a person (hereinafter referred to as the insured) is insured against liabilities to third parties which he may incur, then—

(a) in the event of the insured becoming bankrupt or making a composition or arrangement with his creditors; or

(b) in the case of the insured being a company, in the event of a winding-up order being made, or a resolution for a voluntary winding-up being passed, with respect to the company, or of a receiver or manager of the company's business or undertaking being duly appointed, or of possession being taken, by or on behalf of the holders of any debentures secured by a floating charge, of any property comprised in or subject to the charge;

if, either before or after that event, any such liability as aforesaid is incurred by the insured, his rights against the insurer under the contract in respect of the liability shall, notwithstanding anything in any Act or rule of law to the contrary, be transferred to and vest in the third party to whom the liability was so incurred.

Plaintiff's Amended Complaint, Rec. 25, at 23.

which is not maritime in nature." District Court's Order, Rec. 35, at 5. Although the court did not detail its reasoning, it seems that it felt it was faced with an either/or decision—either this action concerns foreign bankruptcy or this action concerns admiralty—and made its decision in favor of bankruptcy.

The lower court erred in both the characterization and resolution of its decision. Morewitz alleges, in his amended complaint, that he is seeking to recover on a marine protection and indemnity policy which West of England issued on the M/V IMBROS. Plaintiff's Amended Complaint, Rec. 25, at 1, 4. This is enough to confer subject matter jurisdiction, for it is well settled that a suit on a contract of marine insurance falls within our federal admiralty jurisdiction. *Kossick v. United Fruit Co.*, 365 U.S. 731, 735, 81 S.Ct. 886, 890, 6 L.Ed.2d 56 (1961); *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 313, 75 S.Ct. 368, 370, 99 L.Ed.2d 337 (1955); *Insurance Co. v. Dunham*, 78 U.S. (11 Wall.) 1, 35-36, 20 L.Ed. 90 (1870). The English statute is of no import here; subject matter jurisdiction exists with or without it.

This is so because the English statute concerns standing to sue, not subject matter jurisdiction. The statute is not a "bankruptcy statute" but a common direct action statute. Direct action statutes generally have nothing to do with subject matter jurisdiction; they are " 'remedial in character, rather than substantive.' " *Olympic Towing Corp. v. Nebel Towing Co.*, 419 F.2d 230, 241 (5th Cir.1969), *denying petition for rhe'g and reh'g en banc of* 419 F.2d 230 (Brown, C.J., dissenting from denial of rehearing) (quoting *Finn v. Employers' Liability Assurance Corp.*, 141 So.2d 852, 864 (La.Ct.App.1962)). They do not create any liabilities or causes of action, they merely give a group of persons—those whose possible injury was the risk insured by the contract—direct standing to sue an insurer by putting them "in the shoes"

of the assured. *See id.; Tokio Marine & Fire Ins. Co. v. Aetna Casualty Co.*, 322 F.2d 113, 116-17 & n. 8 (5th Cir. 1963); *Degelos v. Fidelity & Casualty Co.*, 313 F.2d 809, 815 (5th Cir.1963). *See also Crown Zellerbach Corp. v. Ingram Indus., Inc.*, 783 F.2d 1296, 1299, 1301 (5th Cir.) (en banc) (overruling in the Fifth Circuit on grounds not relevant here *Olympic Towing Corp. v. Nebel Towing Co.*, 419 F.2d 230 (5th Cir.1969)), *cert. denied*, 417 U.S. 821, 107 S.Ct. 87, 93 L.Ed.2d 40 (1986). The insurer's liability remains the same (that which it had under the contract), only now it has to pay the injured persons, not the assured.[4] Here, the English statute gives direct action litigation rights to the plaintiff, but it does not change the subject matter—marine insurance—upon which his suit is based.

Because the standing question is separate and distinct from the subject matter question, there is no "either/or" decision to make. The plaintiff has standing to sue by virtue of the English statute,[5] so in one sense (the stand-

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[4] It does no good to argue that the insurer's liability is changed because under the terms of an insurance policy it is obligated to pay only after the assured has paid (an indemnity contract) whereas under the statute it must pay even though the assured has not. Such "no action" terms are generally voided by direct action statutes; it is as if they never existed. *Nebel Towing Co.*, 419 F.2d 238, 241 (Brown, C.J., dissenting denial of rehearing). This seems to be the result of the English statute. Such a result occurs because "[t]he direct action statute becomes a part of every insurance policy having effect [in the forum] as though written into the policy." *Nebel Towing Co.*, 419 F.2d 230, 237 (discussing the Louisiana direct action statute). *See also Nebel Towing Co.*, 419 F.2d 230, 241 (" 'No Action' clauses are ineffectual.") (Brown, C.J., dissenting). Because direct action statutes are "part" of the insurance policy, then liability under that policy is not changed by the statutes.

[5] We assume this to be the case for purposes of our subject matter jurisdiction discussion. Plaintiff alleged in his complaint that: "[p]ursuant to the published rules of the Defendant . . . which form a part of the [marine insurance contract], English

ing sense) the basis of his case is that statute. Yet the subject matter of the suit is liability under a marine insurance policy, so the basis of his case also is admiralty subject matter. *See e.g., Maryland Casualty Co. v. Cushing*, 347 U.S. 409, 74 S.Ct. 608, 98 L.Ed. 806 (1954); *Steelmet, Inc. v. Caribe Towing Corp.*, 779 F.2d 1485

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law governs any and all disputes between the Defendant and those claiming under or by virtue of contracts of insurance issued by the Defendant." Plaintiff's Amended Complaint, Rec. 25, at 6. He then took this to mean that the English direct action statute, as English law, was applicable. *Id.* at 7. The defendant concedes in its brief that "the contract identifies English law as the governing law," Defendant's Reply Brief at 12, and also that the English direct action statute is applicable. *Id.* at 17-19. Because both parties seem intent on letting the English statute apply, we deem it to apply for the purposes of this appeal.

But we are not so sure that an extended inquiry into choice of law rules would show that the English statute is applicable. Although it seems clear that English law would govern in construing the existence and amount of defendant's liability under the marine insurance contract, it is not as clear, when the suit is being brought in Alabama, that English procedural law would apply. The cases we have reviewed, although not addressing the choice of law issue directly, indicate that the forum state's law may be the applicable law for purposes of applying any direct action statute. *See e.g., Maryland Casualty Co. v. Cushing*, 347 U.S. 409, 74 S.Ct. 608, 98 L.Ed. 806 (1954); *Steelmet, Inc. v. Caribe Towing Corp.*, 779 F.2d 1485 (11th Cir.1986), *modifying* 747 F.2d 689 (1984); *Nebel Towing* 419 F.2d 230; *Aetna Casualty, supra; Fidelity & Casualty, supra; Ingram Indus., supra*, at 1301 (quoting *Burke v. Massachusetts Bonding & Ins. Co.*, 209 La. 495, 24 So.2d 875 (1946)). *See also Wilson Boat, supra* (discussing marine insurance in general); *Gulf Tampa Drydock Co. v. Great Atlantic Ins. Co.*, 757 F.2d 1172, 1174 (11th Cir.1985) (same).

Thus, the choice of law question could conceivably affect plaintiff's standing, and, consequently, the Court's Article III power to decide the case. *See* U.S. Const. art. III, § 2. We need not concern ourselves with it now, however, as plaintiff has also alleged that he has standing under Alabama law should it apply, *see* Plaintiff's Amended Complaint, Rec. 25, at 28 (referring to Ala.Code §§ 27-23-1 to -2), and as defendant has not seen fit to argue otherwise.

(11th Cir.1986), *modifying* 747 F.2d 689 (1984); *Olympic Towing Corp. v. Nebel Towing Co.*, 419 F.2d 230 (11th Cir.1969), *cert. denied*, 397 U.S. 989, 90 S.Ct. 1120, 25 L.Ed.2d 396 (1970); *Aetna Casualty, supra; Fidelity & Casualty, supra. See also Ingram Indus., supra.* As this is so, the district court erred in dismissing plaintiff's case for lack of subject matter jurisdiction.[6]

III.

For all the foregoing reasons, the district court's judgment is REVERSED and the case is REMANDED for further proceedings.

TJOFLAT, Chief Judge, concurring:

I concur in the result reached by the majority but write separately because I am concerned with its discussion of "standing to sue."

As a suit on a contract of marine insurance, this case falls within the federal courts' admiralty jurisdiction. *See Insurance Co. v. Dunham*, 78 U.S. (11 Wall.) 1, 35-36, 20 L.Ed. 90 (1870). The district court improperly characterizes the role in this suit of a British bankruptcy stat-

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[6] This disposes of the question on subject matter jurisdiction. Thus, we need not and do not address Morewitz's argument that the district court had subject matter jurisdiction over his case due to 28 U.S.C. § 1963.

Morewitz also argues that the court erred in deciding a factual issue without hearing evidence on the merits. In a footnote in its order, the district court suggested that General Development may not be a named insured in the marine insurance policy covering the M/V IMBROS. But we need not and do not address this issue either. First, such a "finding" is of no consequence in relation to the procedural posture of the district court's order, which ruled on defendant's Fed.R.Civ.P. 12(b)(1) & (2) motion to dismiss. Second, the record before the Court is devoid of evidence regarding the issue. We simply could not resolve it on the record before us.

On remand, and after receiving more evidence, the lower court may try again.

ute that provides a third party with a direct action against an insurer when the insured has become insolvent. The district court correctly concludes that the plaintiff's cause of action here depends upon that statute: without it, the plaintiff could bring no direct action against the insurer. The district court, however, incorrectly concludes that the cause of action depends *solely* upon the statute. The action also depends upon the underlying contract of marine insurance: the British statute alone would give the plaintiff no cause of action. Because the suit is based in part on this insurance contract, it falls within the federal courts' admiralty jurisdiction.

The majority is confused about whether this statute provides a basis for the plaintiff's cause of action. The majority states that the statute "concerns standing to sue," but that such statutes "do not create any liabilities or causes of action." *Ante* at 499. A few sentences later, however, the majority concludes that "the English statute gives direct action litigation rights to the plaintiff." *Id.* The term "litigation rights" must surely mean a right, or cause, of action.

The majority's confusion seems to result from its attempt to analogize this British statute to a Louisiana direct action statute, La.Rev.Stat.Ann. § 22:655 (West 1988 & Supp.1989). The Louisiana statute mandates that every liability insurance contract issued in Louisiana contain a direct action provision for third parties against an insurer if an insured becomes insolvent. *See id.* If the British statute involved here operated in this manner, then the majority would be correct in asserting that the British statute creates no "liabilities or causes of action," *ante* at 499. The British Statute, however, operates differently. Rather than mandating a direct action provision in every insurance contract, the statute itself provides the right of action: the insured's "rights against the insurer under the contract in respect of the liability shall . . . be transferred to and vest in the third party to whom the liability was so

incurred." The Third Parties (Rights Against Insurers) Act, 1930, 20 & 21 Geo. 5, ch. 25, § 1(1). This statute thus "vests" a substantive right in the third party—a right that is, of course, equivalent to the insured's rights under the contract.

In short, the plaintiff's right of action in this case depends on both the insurance contract and the statute. This action (because it depends in part on the insurance contract) falls under federal admiralty jurisdiction; I therefore concur in the result reached by the majority.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 88-7497

(D.C. Docket No. 85-0855-T)

STEPHEN J. MOREWITZ, as Administrator for the Estates of CHRISOS PASSALIS, CONSTANTINOS STAMATIS, GERASSIMOS MARKATOS, GEORGE MARANGOS, JESUS RAMOS MAYORQUIN, EFRAN ALVARADO MARTINEZ and MUKHTAR AHMED, Deceased,

Plaintiff-Appellant,

versus

THE WEST OF ENGLAND SHIP OWNERS MUTUAL PROTECTION AND INDEMNITY ASSOC. (LUXEMBOURG),

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Alabama

Before TJOFLAT, Chief Judge, JOHNSON, Circuit Judge, and ESCHBACH*, Senior Circuit Judge.

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* Honorable Jesse E. Eschbach, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby REVERSED; and that this cause be and the same is hereby REMANDED to said District Court for further proceedings in accordance with the opinion of this Court;

IT IS FURTHER ORDERED that defendant-appellee pay to plaintiff-appellant, the costs on appeal to be taxed by the Clerk of this Court.

TJOFLAT, Chief Judge, concurred and filed an opinion.

Entered: March 13, 1990
For the Court:

Miguel J. Cortez
Clerk

By: /s/ Karleen McNoll
Deputy Clerk

Issued as Mandate: May 18, 1990

[Filed May 9, 1990]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 88-7497

STEPHEN J. MOREWITZ, as Administrator for the Estates of CHRISOS PASSALIS, CONSTANTINOS STAMATIS, GERASSIMOS MARKATOS, GEORGE MARANGOS, JESUS RAMOS MAYORQUIN, EFRAN ALVARADO MARTINEZ and MUKHTAR AHMED, Deceased,

Plaintiffs-Appellants,

versus -

THE WEST OF ENGLAND SHIP OWNERS MUTUAL PROTECTION AND INDEMNITY ASSOC. (LUXEMBOURG),

Defendant-Appellee.

Appeal from the United States District Court
for the
Southern District of Alabama

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING IN BANC
(MAY 9, 1990)

Before TJOFLAT, Chief Judge, JOHNSON, Circuit Judge, and ESCHBACH*, Senior Circuit Judge

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* Honorable Jesse E. Eschbach, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

PER CURIAM:

(✔) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Gerald Tjoflat
United States Circuit Judge

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 85-0855-T

STEPHEN J. MOREWITZ,
Plaintiff,

VS.

THE WEST OF ENGLAND SHIP OWNERS MUTUAL PROTECTION AND INDEMNITY ASSOCIATION (LUXEMBOURG),
Defendants.

ORDER

This cause is before the Court on defendants' motion to dismiss brought pursuant to 12(b)(1)&(2) Fed.R.Civ. P. The defendant asserts that this Court lacks subject matter jurisdiction as well as personal jurisdiction. In the alternative, the defendant prays for dismissal under the doctrine of forum non conveniens. As the Court finds that it lacks subject matter jurisdiction, it will not address the issues of personal jurisdiction nor forum non conveniens.

BACKGROUND

This action arises out of the sudden sinking of the SS IMBROS, and the consequential death of all crewmen, somewhere off Bermuda in December 1975. The vessel was carying a cargo of railroad ties from Mobile, Alabama, to Quebec, Canada.

Stephen Morewitz, the appointed administrator of the estates of the deceased crewmen, brought a wrongful death action against the vessel owner of record, Imbros Shipping Company, and General Development & Shipping Enterprises Co., Ltd. (GDSE) in the U. S. District Court for the Eastern District of Virginia. Imbros Shipping was dismissed prior to trial for lack of personal jurisdiction. However, the Court determined that it maintained personal jurisdiction over GDSE and, based upon the failure of GDSE to respond to its discovery orders, the Court found GDSE to be the owner *pro hac vice* of the IMBROS at the time of the loss.

Upon consideration of the evidence presented by the plaintiff, the district court in Virginia found that at the time of the casualty: (1) the IMBROS was unseaworthy; (2) the defendant GDSE had knowledge of such unseaworthiness; and therefore, (3) GDSE was liable for the deaths of the crewmen aboard the IMBROS. The Court entered a judgment against GDSE for damages in the wrongful death actions. Subsequent to the entry of judgment, GDSE became insolvent, and consequently, the judgment has remained unpaid.

The plaintiff, Morewitz, in his capacity as administrator of the estates of seven deceased crewmen, brings this action pursuant to 28 U.S.C. § 1963, asking this Court to enforce the judgment rendered against GDSE in the Eastern District of Virginia. Morewitz asserts that pursuant to the British Third Parties (Rights Against Insurers) Act of 1930, West of England, the insurer of the IMBROS is liable to pay the judgment rendered against GDSE since the Virginia Court deemed GDSE the owner *pro hac vice* of the IMBROS and further found GDSE liable for the wrongful death claim arising from the loss of the IMBROS.

DEFENDANT'S MOTION TO DISMISS

The defendant aserts that this Court lacks subject matter jurisdiction. The burden of proof on a 12(b)(1) motion is on the party asserting jurisdiction. *Menchaco v. Chrysler Credit Corp.*, 613 F.2d 507 (5th Cir. 1980), *cert. denied*, 101 S.Ct. 358, 449 U.S. 953, 66 L.Ed.2d 217. Moreover, no presumptive truthfulness attaches to plaintiff's allegations and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of the jurisdictional claims. *Mortensen v. First Fed. Savings & Loan Ass'n.*, 549 F.2d 884 (3rd Cir. 1977).

The plaintiff, in his amended complaint, seeks to establish this Court's subject matter jurisdiction pursuant to 28 U.S.C. § 1333, by asserting that this is a suit on a contract of marine insurance. However, close analysis reveals that the foundation of the complaint is the British Statute, The Third Parties (Rights Against Insurers) Act, 1930. Said statute provides in pertinent part:

> 1. Rights of third parties against insurers on bankruptcy, etc. of the insured
>
> (1) Where under any contract of insurance a person (hereinafter referred to as the insured) is insured against liabilities to third parties which he may incur, then—
>
> (a) in the event of the insured becoming bankrupt or making a composition or arrangement with his creditors; or
>
> (b) in the case of the insured being a company, in the event of a winding-up order being made, or a resolution for a voluntary winding-up being passed, with respect to the company, or of a receiver or manager of the company's business or undertaking being duly appointed, or of possession being taken, by or on behalf

> of the holders of any debentures secured by a floating charge, of any property comprised in or subject to the charge;
>
> if, either before or after that event, any such liability as aforesaid is incurred by the insured, his rights against the insurer under the contract in respect of the liability shall, notwithstanding anything in any Act or rule of law to the contrary, be transferred to and vest in the third party to whom the liability was so incurred.

According to paragraph 13 of the plaintiff's complaint, the statute provides that in instances of bankruptcy, upon appointment of a receiver or manager for a business, a creditor of the business succeeds to the rights of the insured under an existing contract of insurance. Moreover, paragraph 14 provides:

> By reason of the appointment of said receiver and provisional liquidator of General Development & Shipping Co., Ltd., in Cyprus, its rights to indemnity under the said contract of insurance with the Defendant have become vested in the Plaintiff, *who now has standing to sue the Defendant under the above mentioned provisions of said statute.*
>
> (Emphasis added)

Though the plaintiff contends that this is an action on a marine insurance contract, it is clear that the plaintiff's action is based on a British bankruptcy statute which is not maritime in nature.[1]

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[1] It should be noted that if this Court determined that it had subject matter jurisdiction, and invoked Alabama's direct action statute (§ 27-23-2 Ala. Code 1975), as urged by the plaintiff, the action would be due to be dismissed as the remedy provided by § 27-23-2 can only be exercised after the injured party has recovered a judgment against the insured. See *MacMillan-Bloedel, Inc. v. Firemen's Insurance Company of Newark, New Jersey*, 558 F.Supp. 596 (S.D.Ala. 1983). The evidence herein reflects that

Alternatively, the plaintiff attempts to establish jurisdiction pursuant to 28 U.S.C. § 1963, praying that this Court enforce the judgment of the court in the Eastern District of Virginia.[2] However, such statute does not apply herein because the plaintiff is not seeking to enforce the judgment entered against GDSE in Virginia, but is asserting a new cause of action pursuant to a British statute, against an entity that was not a party to the action in the Eastern District of Virginia.

Based on the foregoing, this Court finds that this action is due to be, and hereby is DISMISSED pursuant to 12(b)(1) Fed.R.Civ.P. for lack of jurisdiction over the subject matter, without prejudice to any right the plaintiff might have to seek recovery elsewhere in a court of competent jurisdiction. Costs taxed against plaintiff.

DONE at Mobile, Alabama, this the 29th day of June 1988.

/s/ Daniel H. Thomas
United States District Judge

Imbros Shipping Company was the only named insured in the policy of insurance covering the SS IMBROS. No judgment has been rendered against the insured.

[2] The plaintiff readily admits that the reason the action was filed in this Court rather than in the Eastern District of Virginia, is that Virginia's long-arm statute affords the plaintiff no relief; whereas, Alabama's long-arm statute is much broader than that of Virginia.

APPENDIX H

[Filed Apr. 3, 1980]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Newport News Division

Civil Action No. 76-103-NN, No. 77-63-NN,
No. 77-95-NN, No. 78-108-NN

STEPHEN J. MOREWITZ, ADMINISTRATOR, ETC., *et al.*,
Plaintiffs

v.

IMBROS SHIPPING CO., LTD., *et al.*,
Defendants

ORDER

In accord with a Memorandum Opinion this day filed and to which reference is hereby made:

(1) Judgment is entered for the defendant, General Development & Shipping Enterprises Co., Ltd., and against the plaintiff, Stephen J. Morewitz, Administrator of the Estates of Augustus Edoro, Afam Eseumi, and Moses Egbonim.

(2) Judgment is entered for the defendant, General Development & Shipping Enterprises Co., Ltd., and against the plaintiff, Stephen J. Morewitz, Administrator of the Estates of Sultan Akbar, Markos Vacilakikas, Armed Zaher, Nickolaos Zorbas, Constantinos Soursos, Ionnis Tsampasis, Nickolaos Costoglou, and Ioannis Sandalakis.

(3) Judgment is entered for the plaintiff, Stephen J. Morewitz, Administrator of the following Estates and

against the defendant, General Development & Shipping Enterprises Co., Ltd, in the amounts indicated, plus interest from date at 8% per annum, plus costs:

Christos Passalis	$ 105,600.00;
Constantinos Stamatis	$ 126,692.80;
Gerassimos Markatos	$ 58,675.00;
George Marangos	$ 88,158.24;
Jesus Ramos Mayorquin	$ 34,864.60;
Efran Alvarado Martinez	$ 18,001.12;
Mukhtar Armed	$ 27,464.60.

It is so ORDERED.

/s/ [Illegible]
United States District Judge

Norfolk, Virginia April 3, 1980.

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Newport News Division

Civil Action No. 76-103-NN, No. 77-63-NN,
No. 77-95-NN, No. 78-108-NN

STEPHEN J. MOREWITZ, ADMINISTRATOR, ETC., *et al.*,
Plaintiffs

v.

IMBROS SHIPPING CO., LTD., *et al.*,
Defendants

MEMORANDUM OPINION

These consolidated complaints in admiralty arising out of the unexplained loss at sea of the SS IMBROS with all hands, on December 18, 1975, in the Bermuda Triangle, were instituted in this Court in June, July, and August, 1977. They proceeded against Imbros Shipping Co., Ltd. and other defendants, including General Development & Shipping Enterprises Co., Ltd. (hereinafter GDSE or General Development). Imbros Shipping Co., Ltd. (hereinafter Imbros Shipping) was the owner of the ill-fated SS IMBROS. It was a one ship corporation.

Finding that the vessel SS IMBROS and its corporate owners, Imbros Shipping Co., Ltd., had insufficient contacts with the Eastern District of Virginia, this Court

held that there was no jurisdiction over the ship or shipowner. As to General Development, however, the evidence on discovery showed that it was acting as agent for twenty or more vessels, many of which called in the Hampton Roads port on a regular basis. The Court therefore found that process might properly issue against General Development in the Eastern District of Virginia. Whether the agency role of General Development as to Imbros Shipping Co., Ltd. could ever have been sufficiently developed to show GDSE as an entity liable to the decreased crew members of SS IMBROS was highly problematical. From the plaintiffs' standpoint, GDSE did pose an attractive target inasmuch as George Tsourinakis, a Greek shipowner, headquartered in Piraeus, was the sole owner of Imbros Shipping Co., Ltd. and was also the principal owner of GDSE.

As the case wound down through discovery against GDSE only, that defendant, which had theretofore actively responded to the orders of this Court, suddenly ceased to respond at all. Thereafter General Development failed to pursue any course to defend itself. Motions for the production of pay records and maintenance records of the SS IMBROS were totally ignored. Requests for production of records, which were supposedly in storage in Piraeus, went unanswered in spite of direct orders from this Court that such records be produced. Finally, with GDSE in apparent default, the Court ordered that any further failure of GDSE to respond to Court orders could result in the Court directing that GDSE be declared the owner *pro hac vice* for the purposes of this litigation and answerable on the issue of liability. GDSE ignored the directions and failed to respond. On July 27, 1979, we held, for reasons stated in an Opinion and Order filed that date, that GDSE, owner *pro hac vice*, was liable. The matter is now the Court for determination of damages.

The record discloses that as to three of the named plaintiffs in the suit, Augustus Edoro, able seaman, Afam Esuemi, able seaman, and Moses Egbonim, oiler, no evidence of support of or of the dependency of anyone as to any of the three crew members has been presented at all. The record therefore contains no proof as to any family dependency or any sums paid by any of these crew members for the support of anyone. Accordingly, the plaintiffs have not carried the burden of proof under any theory of damages and these claims are DISMISSED.

As to the claims of Sultan Akbar, able seaman, the evidence shows that by Order entered and releases exchanged in the Court of First Instance of Piraeus, on April 9, 1977, at which time the family of Akbar was represented by an attorney, this claim was settled and sums in excess of $9,660 in settlement were paid.

As to the claim of Markos Vasilakikas, captain of the IMBROS, the evidence shows that by Order entered and releases exchanged in the above Court on May 28, 1976, at which time the family was represented by an attorney, the claims were settled and sums in excess of $30,000 were paid.

As to the claim of Armed Zaher, mess boy, the evidence shows that by Order entered and releases exchanged in the same Court, this claim was settled on October 23, 1976, with the family of Zaher represented by an attorney. The claimants were paid $6,666.

As to the claim of Nickolaos Zorbos, second mate, the evidence shows that by Order entered and releases exchanged in the same Court on December 22, 1977, at which time the family was represented by an attorney, sums in excess of $20,000 were paid.

The claim of Constantinos Soursos, electrician, the evidence likewise shows was settled and releases exchanged in the same Court on December 3, 1976, with the family represented by an attorney. Sums in excess of $21,000 were paid.

As to the claim of Ionnis Tsampasis, second engineer, the evidence shows that the claim was settled and releases exchanged by Order of the same Court in 1976 and payment made in excess of $24,000. The family was represented by an attorney at the time of settlement.

As to the claim of Nickolaos Costoglou, able seaman, the evidence shows that the claim was settled and releases exchanged in the same Court by Order entered September 7, 1976 with payment to the claimants in excess of $11,000. Attorneys representing the family were present.

As to the claim of Ioannis Sandalakis, third engineer, from depositions tendered by his family, the evidence is that the claim was settled in the same Court in Piraeus and releases exchanged with payments to the claimants in excess of $15,000, and that they employed an attorney to represent them.

The evidence before the Court is, and we so find, that before settlements and compromises are ordered and affirmed by the Court of First Instance in Piraeus, they are considered fully by a qualified judge of that Court. The proceedings are formal. Detailed minutes are kept and recorded. In attendance are the attorneys for all sides, and most often, the claimants in persons. The Judge examines all documents and makes a thorough review of the facts. The voluntary nature of the settlements is of vital importance and is thoroughly considered by the judge personally.

We find the settlements to have been voluntary with attorneys representing all claimants and being present at all sessions. The effort to show overreaching falls far short of the mark. The close scrutiny of releases made by seamen does not apply to releases made by the families of the deceased seamen, supported as they were by attorneys representing them and in a competent Greek Court. *Morewitz, Adm., etc. v. EVGENIA G., etc., et al.*, —— F.2d —— (4th Cir., January 28, 1980).

After eliminating the eight claimants here who we find have voluntarily settled all their claims before the Court of First Instance in Piraeus, Greece and eliminating the claims of the three claimants who failed to produce any evidence, there are left remaining seven plaintiffs whose claims will be considered separately.

In each of the seven cases in which awards are made by the Court, the evidentiary effort to prove dependency or support is offered through a form of stereotype depositions, wherein the same written questions were propounded to selected relatives of deceased crew members. We have read all of the depositions and have given them such weight and credibility as we believe they warrant. As a general observation, the questions were broad and sometime misleading; the answers were couched in broad assertions, making claims for support payments which many times were not substantiated by any real evidence such as receipts, deposits, allotments, or otherwise; speculation was rampant; often the support claimed exceeded the income of the deceased seaman.

We have sorted through the evidence presented and base our award figures on what we consider to be the reliable scope of the proof offered. In all cases we have given the benefit of even a slight preponderance to the claimant, if his proof, in our judgment, justified reliance.

Wage claims based on earnings available and the draws against such earnings whether advances or for wages already earned prior to Mobile on December 11, 1975, are difficult to determine. Records are sparse, incomplete and for the most part, incoherent. For that good reason, attorney for the plaintiffs makes no real argument over wage transactions except at Mobile on December 11, 1975.

Our analysis of wage records (Exhibit 4) covering Mobile and for the subsequent short period until the sink-

ing of the IMBROS on December 18, 1975, indicates no advances beyond earnings, at least not proven by a preponderance of the evidence. Draws of larger remittances by crew members to be sent to their families in Greece, obviously in contemplation of the approaching Christmas Season, are not clearly in excess of wage balances then due such crew members or when actually paid in Piraeus later in December. On the one hand, the attorney for the claimants sought to boost the earnings of his clients crew members by insisting that great overtime and double time wages aboard IMBROS were substantial and usual and in the next breath, would cite only base pay to insist that draws made by the same crew mmebers were advances in excess of wages earned.

In the absence of a showing of a demand, there was no obligation to pay off this Greek crew, on a foreign ship, in Mobile, a port which was not the end of the voyage or the completion of their employment contract. *Fitzgerald v. Liberian S/T CHRYSSI P. GOULANDRIS,* 582 F.2d 312 (4th Cir. 1978).

Certainly wages earned and carried forward on the books before sailing from Mobile on December 12, 1975, and earned at sea in the last week before the sinking on December 18, 1975 would be proper claims, but in the absence of proof by a preponderance of the evidence as to the amount of such claims, we cannot speculate, and respectfully decline to do so.

Likewise, the claim of $20,000 each for conscious pain and suffering is not allowed. In the first place, the sum claimed was without any evidence to support it. A weak reference was offered that several days before the loss, a radiogram from IMBROS to its owners indicated trouble with a minor pump. It is argued that this message would indicate the vessel slowly sank and the claim for conscious pain and suffering is thus enhanced. We cannot give deference to any such argument. Subsequent

radio contact indicated the vessel was afloat and further along its base course two or three days later. The lack of proof to meet its burden defeats plaintiffs' claims. *New Orleans & Northeastern Railroad Co., et al. v. Harris*, 247 U.S. 367 (1918); *Gardner v. National Bulk Carriers, Inc.*, 221 F.Supp. 243 (E.D. Va. 1963), *aff'd*, 333 F.2d 676 (4th Cir. 1964); *Marine Sulphur Transport Corp. v. Marine Transport Lines, Inc.*, 1974 AMC 1504 (S.D. N.Y. 1974).

Christos Passalis

Mr. Passalis was the Chief Engineer of the SS IMBROS and was lost at sea with that vessel on December 18, 1975. The claim before the Court is made by Stephen J. Morewitz, Administrator of the Estate of Christos Passalis, on behalf of Passalis' widow, Zorka Passalis, their child, Heleni, and Passalis' father and mother, Panagiotis and Eleni Passalis.

Christos Passalis was 34 at the time of his death in December, 1975, and would be 38 now. His widow, Zorka, is now 32 years old. His child, Heleni, was born in February, 1976, two months after her father's death. The father claimant is 64 and his mother claimant is 56.

From United States Health and Labor Department's official tables comes the following statistics applicable to his case

*Passalis' life expectancy	34 years
*Passalis' work expectancy	25 years
Zorka Passalis' (widow) life expectancy	46.1 years
Heleni Passalis' (child) life expectancy	74.2 years
Panagiotis Passalis' (father) life expectancy	17.7 years
Eleni Passalis' (mother) life expectancy	26 years.

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* Here, and in the subsequent computations, the life expectancy and work expectancy is taken from 1979, since full allowances are made for years 1975-1979.

From appropriate mathematics tables the present value of annual future payments for each $1.00 payable each future year, applicable to this case, is:

24 years (work expectancy of Christos Passalis) = discount at 8% — 10.675 factor to be applied.

In this case, from the date of his marriage in July, 1975, to his death in December, 1975, the evidence shows Passalis gave his widow $2,000 plus two payments of $400 each, a total of $2,800 in five months. She claims a continuing contribution of $800 per month. Based on the evidence we find only $600 per month to be proved.

The father and mother of Passalis claim support from their son at the rate of $250 per month, but without evidence to support such claim. $100 per month is more likely under the circumstances of this case, particularly in light of the new responsibilities of the new husband and father.

There was not credible proof that any gifts were made at all, or if made, were only spontaneous and not of a continuing character. The claim for $2,000 per year for gifts is clearly without any substantive proof and is DISALLOWED.

Passalis' Damages

Support payments proved	Term	Present Value
Widow and child $6,000 per year	25 years (work expectancy of decedent)—8% discount factor of 10.675	$ 64,050
Mother and Father (Mother's life expectancy is in excess of deceased's work expectancy)	25 years—8% discount factor of 10.529	$ 12,810
$6000 x 4 years (1975-present), widow and child		$ 24,000
$1200 x 4 years (1975-present), mother and father		$ 4,800
		$105,600.

Constantinos Stamatis

Mr. Stamatis was acting Chief Mate of the SS IMBROS and was lost at sea with that vesel on December 18, 1975. The claim before the Court is made by Stephen J. Morewitz, Administrator of the Estate of Constantinos Stamatis, on behalf of Stamatis' widow, Afrodite Stamatis, and Stamatis' mother, Athena Stamatis.

Constantinos Stamatis was 35 at the time of his death in December, 1975 and would be 39 now. His widow, Afrodite, is now 39. The mother claimant Athena is now 74.

From United States Health and Labor Department's official tables come the following statistics applicable to this case:

Stamatis' life expectancy	33.1 years
Stamatis' work expectancy	24.1 years
Afrodite Stamatis' (widow) life expectancy	39.4 years
Athena Stamatis' (mother) life expectancy	11 years.

From appropriate mathematics tables the present value of annual future payments for each $1.00 payable each future year, applicable here are:

24 years (work expectancy of Constantinos Stamatis) = discount at 8%	— 10.529 factor to be applied.
11 years (life expectancy of Athena Stamatis) = discounts at 8%	— 7.1390 factor to be applied.

In this case, the evidence can only sustain monthly payments at the rate of $650 to the widow, Afroditi, as opposed to $800 per month claimed by her. Support to the mother, Athena, is presented in the form of written substantiation of about $1000 in 11 months. We conclude $100 per month to the mother is the limit of the evidence.

Again, there is no credible proof of a continuing gift routine and such claims, if any, are DISALLOWED.

Stamatis' Damages

Support payments proved	Term	Value Present
Widow, Afrodite, $7800 per year	24 years (work expectancy of decedent)—8% discount factor of 10.529	$ 82,126.20
Mother, Athena, $1200 per year	11 years (life expectancy)—8% discount factor of 7.1390	$ 8,566.60
$7800 x 4 years (1975-present), widow		$ 31,200.00
$1200 x 4 years (1975-present), mother		$ 4,800.00
		$126.692.80.

Gerassimos Markatos

Mr. Markatos was the Boatswain of the SS IMBROS and was lost at sea with that vessel on December 18, 1975. The claim before the Court is brought by Stephen J. Morewitz, Administrator of the Estate of Gerassimos Markatos, on behalf of Andreas Markatos, father, and Anastasia, mother.

Gerassimos Markatos was 40 at the time of his death in December, 1975 and would be 44 now. His father, Andreas, is now 78 and his mother, Anastasia, is now 68.

From United States Health and Labor Department's official tables, the following statistics are applicable to this case:

Markatos' life expectancy	28.6 years
Markatos' work expectancy	19.8 years
Andreas Markatos' (father) life expectancy	6.9 years
Anastasia Markatos' (mother) life expectancy	15.1 years.

From appropriate mathematics tables the present value of annual future payments for each $1.00 payable each future year, applicable here, are:

15 years (life expectancy of Anastasia Markatos)	= discount at 8%	8.5995 factor to be applied.

In this case the evidence sustains support by Markatos, who was unmarried, of his mother and father at the rate of $400 per month.

There is no credible evidence upon which to base any award on the grounds of continuing gifts.

Markatos' Damages

Support payments proved	Term	Present Value
Mother and Father, $4800 per year	15 years (life expectancy of mother)	$41,075
$48000 x 4 years (1975-present), parents		$17,600
		$58,675

George Marangos

Mr. Marangos was the Cook aboard the SS IMBROS and was lost at sea with that vessel on December 18, 1975. The claim before the Court is made by Stephen J. Morewitz, Administrator of the Estate of George Marangos, on behalf of Marangos' widow, Anna Marangos, and three children of Marangos, Andreas, Ekaterini and Georgia.

George Marangos was 47 at the time of his death in December, 1975 and would be 51 now. His widow, Anna, is now 39. The present ages of his three children are, Andrea, 16, Ekaterini, 5 and Georgia 4.

From United States Health and Labor Department's official tables come the following pertinent statistics applicable to this case:

Marangos' life expectancy	22.8 years
Marangos' work expectancy	14.1 years
Anna Marangos' (widow) life expectancy	39.4 years
Andreas Marangos' (daughter) life expectancy	61.5 years
Ekaterini Marangos' (daughter) life expectancy	72.3 years
Georgia Marangos' (daughter) life expectancy	73.3 years.

From the appropriate mathematics tables the present value of annual future payments for each $1.00 payable each future year is:

14 years (work expectancy of George Marangos) = discount of 8%	8.2442 factor to be applied.

In this case we find the credible evidence to be that Marangos was contributing $600 per month to his wife and family.

Again, there is no credible evidence upon which to base any award on the grounds of sustaining gifts.

Marangos' Damages

Support payments proved	Term	Present Value
Widow and family $7200 per year	14 years (work expectancy of decedent)	$59,358.24
$7200 x 4 years (1975-present), widow and children		$28,800.00
		$88,158.24.

Jesus Ramos Mayorquin

Mr. Mayorquin was an able seaman aboard the SS IMBROS and was lost at sea with that vessel on December 18, 1975. The claim before the Court is made by Stephen J. Morewitz, Administrator of the Estate of Jesus Ramos Mayorquin, on behalf of his father, Felix, mother, Guillermina, sister, Maria, brother Daniel, and brother, Jose.

Jesus Mayorquin was 34 at the time of his death in December, 1975 and would be 38 now. His father, Felix, is now 72; his mother, Guillermina, is now 58; sister, Maria is now 14; brother, Daniel is now 17; and brother, Jose, is now 18.

From United States Health and Labor Department's official tables come the following pertinent statistics applicable to this case:

Mayorquin's life expectancy	34 years
Mayorquin's work expectancy	25 years
Felix Mayorquin's (father) life expectancy	10 years
Guillermina Mayorquin's (mother) life expectancy	23.4 years.

From the appropriate mathematics tables the present value of annual future payments for each $1.00 payable each future year are:

24 years (life expectancy of Guillermina Mayorquin, mother) = discount at 8 %	10.529 factor to be applied.

In this case we find the credible evidence to be that Mayorquin was contributing $200 per month for the support of his father, mother, sister and brothers.

Again, there is no credible evidence upon which to base any award on the grounds of sustaining gifts.

Mayorquin's Damages

Support payments proved	Term	Present Value
Family—$2400 per year	24 years (life expectancy of mother)	$25,264.60
$2400 x 4 years (1975-present), family		$ 9,600.00
		$34,864.60

Efran Alvarado Martinez

Mr. Martinez was a deckboy aboard the SS IMBROS and was lost at sea with that vessel on December 18, 1975. The claim before the Court is brought by Stephen J. Morewitz, Administrator of the Estate of Efran Alvarado Martinez, in behalf of his father, Efrain, mother, Priscilla; sister, Denora; brother, Jose; brother, Danelo.

Efran Martinez, unmarried, was 24 at the time of his death in December, 1975 and would be 28 now. His father, Efrain, is now 53; his mother, Priscilla, is now 51; his sister, Denora is now 12; his brother, Jose, is now 19; and his brother Danelo is now 21.

From the United States Health and Labor Department's official tables come the following pertinent statistics applicable to the case:

Martinez' life expectancy	43.3 years
Martinez' work expectancy	34.2 years
Efrain Martinez' (father) life expectancy	21.2 years
Priscilla Martinez' (mother) life expectancy	28.6 years.

From the appropriate mathematics tables the present value of annual future payments for each $1.00 payable each future year is:

28 years (life expectancy of Priscilla Martinez, mother) + discount at 8%	11.051 factor to be applied.

In this case the credible evidence is that Martinez was contributing $100 per month to his mother and father.

Again, there is no evidence upon which to base any award on the grounds of sustaining gifts.

Martinez' Damages

Support payments proved	Term	Present Value
Mother and Father $1200 per year	28 years (life expectancy of mother)	$13,201.12
$1200 x 4 years (1975-present), parents		$ 4,800.00
		$18,001.12.

Mukhtar Armed

Mr. Armed was the Assistant Cook aboard the SS IMBROS and was lost at sea with the vessel on December 18, 1975. The claim before the Court is made by Stephen J. Morewitz, Administrator of the Estate of Mukhtar Armed on behalf of his father, Gulzar; his mother; Khatoon; his brother, Zulfegar; his brother, Iftikhar; and his brother, Ijoz.

Mukhtar Armed was 21 at the time of his death in December, 1975 and would now be 25. His father, Gulzar, was 56; his mother, Khatoon was 45; his brother, Zulfegar was 16; his brother, Iftikhar was 11; and his brother, Ijoz was 19.

From the United States Health and Labor Department's official tables come the following perintent statistics applicable to this case:

Armed's life expectancy	**46 years**
Armed's work expectancy	**37 years**
Gulzar Armed's (father) life expectancy	**17.7 years**
Khatoon Armed's (mother) life expectancy	**30.3 years.**

From appropriate mathematics tables the present value of annual future payments for each $1.00 payable each future year, applicable here, are:

30 years (work expectancy of Armed; life expectancy of Khatoon Armed, mother) = discount at 8%	**11.258 factor to be applied.**

In this case the credible evidence is that Armed contributed $150 per month for the support of his mother, father, and brothers.

There is no credible evidence upon which to base any award on the grounds of prospective continuing gifts.

Armed's Damages

Support payments proved	Term	Present Value
Mother, Father and Brothers $1800 per years	30 years (work expectancy of Armed; life expectancy of Khatoon Armed, mother)	$20,264.40
$1800 x 4 years (1975-present), family		$ 7,200.00
		$27,464.40.

Summary

(1) The claim of Stephen J. Morewitz, Administrator of the Estates of Augustus Edoro, Afam Eseumi and Moses Egbonim, are DISMISSED, for failure to present any evidence and thus to meet the burden of proof.

(2) The claim of Stephen J. Morewitz, Administrator of the Estates of Sultan Akbar, Markos Vasilakikas, Armed Zaher, Nickolaos Zorbas, Constantinos Soursos, Ionnis Tsampsis, Nickolaos Costoglou, and Ioannis Sandalakis are DISMISSED, as having been settled and released in appropriate actions brought in the Court of First Instance in Piraeus, Greece.

Judgments will be forthwith entered in favor of Stephen J. Morewitz, Administrator in each of the following Estates, as indicated:

Christos Passalis	$105,600.00;
Constantinos Stamatis	$126,692.80;
Gerassimos Markatos	$ 58,675.00;
George Marangos	$ 88,158.24;
Jesus Ramos Mayorquin	$ 34,864.60;
Efran Alvarado Martinez	$ 18,001.12;
Mukhtar Armed	$ 27,464.40,

plus interest at 8% per annum from this date, plus costs.

It is so ORDERED.

/s/ [Illegible]
United States District Judge

Norfolk, Virginia April 3, 1980.

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Newport News Division

Civil Action No. 76-103-NN

RUTH A. MOREWITZ, ADMINISTRATRIX, ETC., *et al.*,
Plaintiffs

v.

IMBROS SHIPPING CO., LTD., *et al.*,
Defendants

ORDER

This matter has been pending on this Court's docket since July, 1976. It grows out of the unexplained sinking of the SS IMBROS, with loss of all hands somewhere off Bermuda in December, 1975. The several plaintiffs are the personal representatives of lost crewmen. The vessel owner of record, Imbros Shipping Co., Ltd., was dismissed earlier for lack of jurisdiction. Remaining as defendants, under a variety of claims, many of which have been conjured up by the facile mind of the plaintiffs' attorney, are Contramar, S.A., Continental Lines (Armement), S.A., Neptune International Shipping, Ltd., United States of America, and General Development & Shipping Enterprises Co., Ltd.

This Order deals only with General Development & Shipping Enterprises Co., Ltd. [hereinafter "General Development"].

The file will reveal extensive discovery aimed by plaintiffs to establish jurisdiction in this federal district. In an Order dated August 28, 1978, the Court found that General Development, an agent of SS IMBROS, had transacted sufficient business in Hampton Roads in Eastern Virginia to satisfy process and to warrant its being sued here. Plaintiffs' claims against General Development, stated broadly, deal with the condition, stability, and manning of the IMBROS, and the element of control of the vessel by General Development, if of such totality as to saddle that defendant with a prospect of liability.

Discovery to General Development to produce ship's reports, logs, inspections, drydockings, maintenance, and information as its providing crews for the vessel, has been unavailing, although a year ago, the owner of General Development indicated such papers were in storage. Now, in spite of many and repeated Court orders directly ordering the production of documents and General Development's personnel to testify on discovery, no response can be obtained from General Development owners in Greece. It is suggested that General Development is out of business.

Finally, by an ultimatum direction issued on February 1, 1979, a final thirty day period to respond was given with no response. Trial is set for May 22, 1979.

Under authority of Rule 37(d) of the Federal Rules of Civil Procedure, because of defendant's, General Development's, failure to respond to the discovery orders of this Court, it is ORDERED:

(1) For the purpose of the trial in this matter General Development & Shipping Enterprise Co., Ltd. shall be considered as owner *pro hac vice* at the time of the loss.

(2) General Development & Shipping Enterprises Co., Ltd., at trial, is precluded from introducing any evidence

pertaining to the documents requested from General Development by the other parties dealing with the condition of the SS IMBROS, its stability, maintenance of its machinery and equipment.

(3) The failure of General Development & Shipping Enterprises Co., Ltd. to respond to discovery requested since November, 1978 carried with it the adverse inference that the information and documents sought would have been unfavorable to General Development.

These sanctions are not to be construed as concomitant to a pronouncement of liability. The requirements of proof at trial, that even an owner *pro hac vice* is liable will prevail.

/s/ [Illegible]

Norfolk, Virginia March 26, 1979.

APPENDIX K

[Filed Jan. 30, 1979]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NEWPORT NEWS DIVISION

Civil Action No. 76-103-NN

RUTH A. MOREWITZ, Administratrix of the Estate of CONSTANTINOS STAMATIS, ETC.,
Plaintiff,

-versus-

IMBROS SHIPPING CO., LTD., *et als,*
Defendants.

Civil Action No. 77-63-NN

RUTH A. MOREWITZ, Administratrix of the Estate of JESUS RAMOS MAYORQUIN, deceased,
Plaintiff,

-versus-

IMBROS SHIPPING CO., LTD., *et als,*
Defendants

Civil Action No. 77-95-NN

RUTH A. MOREWITZ, Administratrix of the Estate of EFRAIN ALVARADO MARTINEZ, deceased,
Plaintiff,

-versus-

IMBROS SHIPPING CO., LTD., *et als,*
Defendants.

ORDER

It appearing to the Court that Ruth A. Morewitz died on December 6, 1978, at Charlottesville, Virginia, and that Stephen J. Morewitz has been appointed by the Clerk of the Circuit Court of the City of Newport News, Virginia, as Administrator de bonis non of the Estates of Christos Passalis, George Marangos, Constantinos Stamatis, Gerassimos Markatos, Jesus Ramos Mayorquin, Efrain Alvarado Martinez, Moses Egbonim, Augustus Edoro, Khalid Sultan, Mukhtar Ahmed and Afam Esumei, and has duly qualified and given bonds,

It is hereby ORDERED, ADJUDGED and DECREED that Stephen J. Morewitz, Administrator, d.b.n of the Estates of Christos Passalis, George Marangos, Constantinos Stamatis, Gerassimos Markatos, Jesus Ramos Mayorquin, Efrain Alvardo Martinez, Moses Egbonim, Augustus Edoro, Khalid Sultan, Mukhtar Ahmed and Afam Esumei, be and he hereby is, substituted as Plaintiff and Intervening Plaintiff in the above styled actions.

/s/ [Illegible]
United States District Judge

Norfolk, Virginia January 29, 1979

I ask for this:

/s/ [Illegible]
BURT M. MOREWITZ
Of Attorneys for Plaintiffs &
Intervening Plaintiffs

Seen:

/s/ [Illegible]
SEAWELL, MCCOY, DALTON, HUGHES,
GORE & TIMMS
Attorneys for Defendant
General Development & Shipping
Enterprises Co., Ltd.

/s/ [Illegible]
VANDEVENTER, BLACK, MEREDITH
& MARTIN
Attorneys for Defendants
Continental Lines, S.A. and
Contramar, S.A.

/s/ [Illegible]
JETT, BERKLEY, FURR & PRICE
Attorneys for Defendant
Neptune International Shipping, Ltd.

/s/ Stephen E. Leach
STEPHEN E. LEACH
Of Attorneys for Defendant
United States of America

APPENDIX L

TITLE 9

ARBITRATION

Sec.

1. "Maritime transactions" and "commerce" defined; exceptions to operation of title.

2. Validity, irrevocability, and enforcement of agreements to arbitrate.

3. Stay of proceedings where issue therein referable to arbitration.

4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination.

5. Appointment of arbitrators or umpire.

6. Application heard as motion.

7. Witnesses before arbitrators; fees; compelling attendance.

8. Proceedings begun by libel in admiralty and seizure of vessel or property.

9. Award of arbitrators; confirmation; jurisdiction; procedure.

10. Same; vacation; grounds; rehearing.

11. Same; modification or correction; grounds; order.

12. Notice of motions to vacate or modify; service; stay of proceedings.

13. Papers filed with order on motions; judgment; docketing; force and effect; enforcement.

14. Contracts not affected.

§ 1. "Maritime transactions" and "commerce" defined; exceptions to operation of title

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

July 30, 1947, c. 392, 61 Stat. at 670.

§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

July 30, 1947, c. 392, 61 Stat. 670.

§ 3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to

arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

July 30, 1947, c. 392, 61 Stat. 670.

§ 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the

trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

July 30, 1947, c. 392, 61 Stat. 671; Sept. 3, 1954, c. 1263, § 19, 68 Stat. 1233.

§ 16. Appeals

(a) An appeal may be taken from—

(1) an order—

(A) refusing a stay of any action under section 3 of this title,

(B) denying a petition under section 4 of this title to order arbitration to proceed,

(C) denying an application under section 206 of this title to compel arbitration,

(D) confirming or denying confirmation of an award or partial award, or

(E) modifying, correcting, or vacating an award;

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

(3) a final decision with respect to an arbitration that is subject to this title.

(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order—

(1) granting a stay of any action under section 3 of this title;

(2) directing arbitration to proceed under section 4 of this title;

(3) compelling arbitration under section 206 of this title; or

(4) refusing to enjoin an arbitration that is subject to this title.

(Added Pub.L. 100-702, Title X, § 1019(a), Nov. 19, 1988, 102 Stat. 4671, § 15, renumbered Pub.L. 101-650, Title III, § 325(a)(1), Dec. 1, 1990, Stat. 5120.)

APPENDIX M

CHAPTER 23

CASUALTY INSURANCE CONTRACTS

ARTICLE 1.

GENERAL PROVISIONS.

§ 27-23-1. When insurer's liability absolute.

As to every contract of insurance made between an insurer and any insured by which such insured is insured against loss or damage on account of the bodily injury or death by accident of any person for which loss or damage such insured is responsible, whenever a loss occurs on account of a casualty covered by such contract of insurance, the liability of the insurer shall become absolute and the payment of the loss shall not depend upon the satisfaction by the insured of a final judgment against him for loss, or damage or death occasioned by the casualty. No such contract of insurance shall be cancelled or annulled by any agreement between the insurer and the insured after the insured has become responsible for such loss or damage, and any such cancellation or annulment shall be void. (Code 1940, T. 28, § 11; Acts 1971, No. 407, p. 707, § 484.)

§ 27-23-2. Rights of judgment creditors.

Upon the recovery of a final judgment against any person, firm or corporation by any person, including administrators or executors, for loss or damage on account of bodily injury, or death or for loss or damage to property, if the defendant in such action was insured against the loss or damage at the time when the right of action arose, the judgment creditor shall be entitled to have the insurance money provided for in the contract of insurance between the insurer and the defendant applied to the

satisfaction of the judgment, and if the judgment is not satisfied within 30 days after the date when it is entered, the judgment creditor may proceed against the defendant and the insurer to reach and apply the insurance money to the satisfaction of the judgment. (Acts 1953, No. 283, p. 350; Acts 1971, No. 407, p. 707, § 485.)

APPENDIX N

THE THIRD PARTIES (RIGHTS AGAINST INSURERS) ACT 1930

(20 & 21 Geo. 5 c. 25)

An Act to confer on third parties rights against insurers of third-party risks in the event of the insured becoming insolvent, and in certain other events

[10th July 1930]

Before the passing of this Act a creditor had no right to the proceeds, as such, of any third party insurance effected by a person insolvent (or a company in liquidation) when the insurance moneys became payable to meet his claim. This Act is designed to remedy the injustice of that position (as respects injured third parties) to which Atkin L.J. referred in *Re Harrington Motor Co., Ltd., Ex parte Chaplin,* [1928] Ch. 105, at pp. 116, 117; followed in *Hood's Trustees* v. *Southern Union General Insurance Co. of Australasia, Ltd.,* [1928] Ch. 793, C.A.

Cf.. the agreement dated 17th June 1946 between the Minister of Transport and the Motor Insurers' Bureau (see Bingham's Motor Claims Cases (5th Edn.) 658) providing that a third party injured by a motorist without an effective policy of insurance shall receive damages to the same extent as if the motorist had an effective policy.

1. Rights of third parties against insurers on bankruptcy, etc., of the insured

(1) Where under any contract of insurance a person (hereinafter referred to as the insured) is insured against liabilities to third parties which he may incur, then—

(*a*) in the event of the insured becoming bankrupt or making a composition or arrangement with his creditors; or

(*b*) in the case of the insured being a company, in the event of a windingup order being made, or

a resolution for a voluntary winding-up being passed, with respect to the company; or of a receiver or manager of the company's business or undertaking being duly appointed, or of possession being taken, by or on behalf of the holders of any debentures secured by a floating charge, of any property comprised in or subject to the charge;

if, either before or after that event, any such liability as aforesaid is incurred by the insured, his rights against the insurer under the contract in respect of the liability shall, notwithstanding anything in any Act or rule of law to the contrary, be transferred to and vest in the third party to whom the liability was so incurred.

(2) Where an order is made under section one hundred and thirty of the Bankruptcy Act, 1914, for the administration of the estate of a deceased debtor according to the law of bankruptcy, then, if any debt provable in bankruptcy is owing by the deceased in respect of a liability against which he was insured under a contract of insurance as being a liability to a third party, the deceased debtor's rights against the insurer under the contract in respect of that liability shall, notwithstanding anything in the said Act, be transferred to and vest in the person to whom the debt is owing.

(3) In so far as any contract of insurance made after the commencement of this Act in respect of any liability of the insured to third parties purports, whether directly or indirectly, to avoid the contract or to alter the rights of the parties thereunder upon the happening to the insured of any of the events specified in paragraph (*a*) or paragraph (*b*) of subsection (1) of this section or upon the making of an order under section one hundred and thirty of the Bankruptcy Act, 1914, in respect of his estate, the contract shall be of no effect.

(4) Upon a transfer under subsection (1) or subsection (2) of this section, the insurer shall, subject to the provisions of section three of this Act, be under the same liability to the third party as he would have been under to the insured, but—

(*a*) if the liability of the insurer to the insured exceeds the liability of the insured to the third party; nothing in this Act shall affect the rights of the insured against the insurer in respect of the excess; and

(*b*) if the liability of the insurer to the insured is less than the liability of the insured to the third party, nothing in this Act shall affect the rights of the third party against the insured in respect of the balance.

(5) For the purposes of this Act, the expression "liabilities to third parties", in relation to a person insured under any contract of insurance, shall not include any liability of that person in the capacity of insurer under some other contract of insurance.

APPENDIX O

Extracts of the Rules of The West of England Ship Owners Mutual Protection and Indemnity Association (Luxembourg)

THE RULES

OF

THE WEST OF ENGLAND SHIP OWNERS

MUTUAL PROTECTION

AND

INDEMNITY ASSOCIATION

(LUXEMBOURG)

as of 20th February 1975

* * * *

Insurance afforded by Association based on Rules

3.—Subject to the powers of the Association (as set out in the Constitution) to accept entries on special terms the insurance afforded by the Association shall be in accordance with and upon the terms of these Rules.

Members and Successors bound by Rules

4.—(a) Subject to any special terms which may have been agreed in writing between the Member and the Association these Rules for the time being in force shall bind a person on becoming a Member of the Association to the same extent as if they had been signed by the Member and contained an undertaking on his part to observe all and each of the provisions thereof.

(b) All contracts of insurance entered into between the Association and any Owner shall, save in so far as

they contain any special terms inconsistent herewith, be deemed to incorporate and shall incorporate all the provisions of these Rules.

(c) An insured Owner who has entered a vessel for insurance in the Association shall be deemed to have agreed not only on his own behalf but also on behalf of his successors and each of them that both he and they will in every respect be subject to and bound by the provisions of these Rules and by any contract of insurance with the Association.

* * * *

PART IV—TERMS AND CONDITIONS OF INSURANCE

Payment first by Insured Owner

18.—Unless the Association in its absolute discretion shall otherwise determine it shall be a condition precedent of an insured Owner's right to recover from the funds of the Association in respect of any liabilities, costs of expenses that he shall first have discharged or paid the same.

* * * *

Rules subject to English law

62.—These Rules and all contracts between an insured Owner and the Association relating to the insurance afforded by the Association or otherwise shall be governed by English law.

* * * *

Arbitration

64.—If any difference or dispute shall arise between an insured Owner (including an Owner who has ceased to be insured by the Association) and the Association out of or in connection with these Rules or arising out of any contract between an insured Owner and the Association or as to the rights or obligations of the Association or the insured Owner thereunder or in connection therewith

or as to any other matter whatsoever, such difference or dispute shall be referred to the arbitration in London of a sole legal Arbitrator. Such Arbitrator shall be a practising Queen's Counsel of the Commercial Bar and if unavailable any other practising Queen's Counsel and the submission to arbitration and all the proceedings therein shall be subject to the provisions of the Arbitration Act 1950 and any Statutory modification or re-enactment thereof. In any such Arbitration any matter decided or stated in any Judgment or Arbitration Award (or in any Reasons given by an Arbitrator or Umpire for making any Award) relating to proceedings between the insured Owner and any third party, shall be admissible in evidence. The obtaining of an Arbitration Award as hereinbefore provided shall be a condition precedent to the right of any insured Owner to bring or maintain any action, suit or other legal proceedings against the Association in respect of any such difference or dispute.

* * * *

Supreme Court, U.S.
FILED
JAN 5 1996

(2)

NO. 95-883

IN THE

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

The West of England Ship Owners
Mutual Protection and Indemnity Association
(Luxembourg),

Petitioner,

v.

Stephen J. Morewitz,
as administrator, etc.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Ross Diamond III
Diamond, Hasser & Frost
Post Office Drawer 40600
Mobile, AL 36640-0600
(334) 432-3362
Counsel of Record for Respondents

66 PP

QUESTIONS PRESENTED FOR REVIEW

1. As to the jurisdiction of the court of appeals in the decision under review, the question is correctly stated as whether the Eleventh Circuit had jurisdiction, under 28 U.S.C. §1291, to act upon the Respondents' appeal from a final judgment of the District Court dismissing the case, with prejudice.

2. Whether the Eleventh Circuit correctly applied accepted principles of law as to waiver, when it found from undisputed evidence in the record that the Petitioner waived any right it may have had to arbitration with its own insured by failure to demand arbitration on any coverage issue for more than fifteen years after the sinking of the insured vessel, asserting a right to London arbitration only after a substantial change in British law occurring in 1990, to the prejudice of the Respondents.

3. In a novel issue not previously asserted by the Petitioner in the courts below, whether the Eleventh Circuit applied the appropriate federal admiralty choice of law principles to correctly hold that the forum state procedural laws should be applied to this action in aid of execution on a judgment.

PARTIES

The Petitioners have correctly identified the parties to this action.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW.....	i
PARTIES.....	i
TABLE OF AUTHORITIES.....	iv
STATEMENT OF BASIS FOR JURISDICTION...	1
STATUTORY PROVISIONS INVOLVED.....	1
STATEMENT OF THE CASE.....	1
(a) Statement of Proceedings Below.....	2
(b) Statement of the Facts.....	4
The Casualty.....	4
Virginia Litigation.....	5
Waiver.....	9
REASONS TO DENY THE WRIT.....	12
I. The Eleventh Circuit correctly held that it had jurisdiction to act on this appeal from a final judgment of the District Court dismissing the case with prejudice, an appealable order under 28 U.S.C. §1291. Such jurisdiction gave the court the power to review and correct orders which had previously been interlocutory, including the erroneous arbitration order herein. On this point there is no conflict among the circuits.....	12

II. The Eleventh Circuit correctly applied accepted principles of law as to waiver, when it found from undisputed evidence in the record that the Petitioner had waived any right to arbitration with its own insured many years ago, to the prejudice of the Respondents. The case does not involve a mere failure to make a pre-litigation demand to arbitrate..... 16

III. Under appropriate federal admiralty choice of law principles, the Eleventh Circuit correctly held that state procedural law should be applied to this action in aid of execution on a judgment..... 21

CONCLUSION..... 26

APPENDIX..... 1a

TABLE OF AUTHORITIES

CASES	PAGE
Adair Bus Sales, Inc. v. Blue Bird Corp., 25 F. 3rd 953 (10th Cir. 1994)	15
American Casualty Co. v. L-J, Inc., 35 F. 3rd 133 (4th Cir. 1994)	16
E.B. Maryland Casualty Co. v. Cushing, 347 U.S. 409	3, 22, 36
Firma C-Trade S.A. v. Newcastle Protection and Indem. Ass'n., 2 Lloyd's Rep. 191 (H.L. 1990)	12, 13
Fleming v. Pan American Fire & Cas. Co., 495 F. 2d 535 (5th Cir. 1974)	24
General Guaranty Ins. Co. v. New Orleans Gen. Agency, Inc., 427 F. 2d 924, 928 (5th Cir. 1970)	20
Humphrey v. Prudential Sec., Inc., 4 F. 3rd 313 (4th Cir. 1993)	16
Lauritzen v. Larsen, 345 U.S. 571 (1953)	21
Lubrizol Intern., S.A. v. M/V STOLT ARGOBAY, 562 F. Supp. 565, 573 (S.D.N.Y. 1982)	20
Macey v. Crum, 249 Ala. 249, 30 So. 2d 666, 668 (1947)	24
Morewitz v. West of England Ship Owners Mut., 896 F. 2d, 495, 499-500 (11th Cir. 1990) (*Morewitz I*)	3, 21
Morewitz v. West of England Ship Owners Mut. 5 F. 3d 1498 (11th Cir. 1993) (*Morewitz II*)	3. 13
Morewitz v. West of England, 62 F. 3rd 1356 (11th Cir. 1995) (*Morewitz III*)	16, 22, 23

Morewitz v. General Development and Shipping Enterprises Co., Ltd., 660 F. 2d 491 (4th Cir. 1981), cert. denied, 454 U.S. 939 (1981)..... 8
Perera v. Siegel Trading Co., Inc., 951 F. 2d 780 (7th Cir. 1992)..... 15
Psarianos v. Standard Marine, Ltd., Inc., 728 F. Supp. 438, 449-453 (E.D. Tex. 1989)..... 17
Psarianos v. Standard Marine, Ltd., Inc., 12 F. 3rd 461 (5th Cir.), cert denied, 114 S. Ct. 2164, ____U.S.____ (1994)..... 13, 17
Schoenamsgruber v. Hamburg Am. Line, 294 U.S. 454 (1935)..... 14
Socony Mobil Oil, Inc. v. West of England Ship Owners Mutual Ins. Assoc. (London) Ltd., 2 Lloyd's R. 191 (H.L. 1190)..... 12, 13
Southside Internists Group v. Janus Capitol Corp., 741 F. Supp. 1536 (N.D. Ala. 1990)..... 20
State Trading Corp. of India v. Assuranceforeningen Skuld, 921 F. 2d, 409 (2nd Cir. 1990)..... 24
State Establishment for Agr. Prod. Trading v. M/V WESERMUNDE, 838 F. 2d 1576, 1579, (11th Cir. 1988)..... 14, 15
Stedor Enterprises, Ltd. v. Armtex, Inc., 947 F. 2d 727, 731 (4th Cir. 1991)..... 15, 16
Steelmet, Inc. v. Caribe Towing Corp., 779 F. 2d 1485, 1487 (11th Cir. 1986), modifying 747 F. 2d 689 (1984)..... 22, 23
Stifel Nicholaus & Co., Inc. v. Freeman, 924 F. 2d, 147 (8th Cir. 1991)..... 20
Tenaco Resins, Inc. v. Davey Intern., A.G., 770 F. 2d 416 (5th Cir. 1985)..... 17
Thomson McKinnon Securities, Inc. v. Salter,

873 F. 2d 1397 (11th Cir. 1989)..... 16
Wilburn Boat Co. v. Fireman's Fund Ins. Co.,
348 U.S. 310, 320-21 75 S. Ct. 368, 374,
99 L. Ed. 337 (1955)..... 26

STATUTES

Death on the High Seas Act,
46 U.S.C. §761..... 14
Federal Arbitration Act,
9 U.S.C.,
§§1-16..... 1, 3, 15
§3..... 16
§4..... 16
§16..... 14, 15
§16(a)(3)..... 16
§16(b)..... 13

Jones Act,
46 U.S.C. §688..... 21

Judicial Code, 28 U.S.C.,
§1254..... 1
§1291..... 1, 12, 13, 14
§1292..... 4
§1963..... 1, 2, 25

Code of Alabama,
§27-23-1 and §27-23-2..... 1, 3 24

The Third Parties (Rights Against Insurers)
Act of 1930..... 1, 2, 12

RULES

Federal Rules of Appellate Procedure,

3..... 14
4..... 14

Federal Rules of Civil Procedure,

54(a)..... 14
58..... 14
69..... 1, 25

TREATISE

Moore's Federal Practice,

¶¶54.01-54.04, ¶110.13[1] and ¶110.25[2]..... 14

STATEMENT OF BASIS FOR JURISDICTION

The Respondents agree that the only basis for review of the September 6, 1995, decision of the Eleventh Circuit would be on a writ of certiorari under 28 U.S.C. §1254. However, there exists no conflict among the Circuits on any issue material to the result below, nor does the decision by the Eleventh Circuit involve issues which otherwise warrant the attention of this court.

STATUTORY PROVISIONS INVOLVED

The statutes and rules involved in the proceeding below and the issues asserted by the Petitioner include: Sections 3, 4 and 16 of the Federal Arbitration Act, 9 U.S.C. §§1-16; Registration of Judgments of the District Courts, 28 U.S.C. §1963; Rule 69 of the Federal Rules of Civil Procedure; Sections 27-23-1 and 27-23-2, Code of Alabama, (1975); and a British statute known as The Third Parties (Rights Against Insurers) Act of 1930.

STATEMENT OF THE CASE

The documents contained in the appendices to the Petitioner's brief are cited as [Pet. App. ___]. Certain documents not included in the Petitioner's appendices are appended as Respondent's Appendices and cited as [Resp. App. ___].

Because of the manner in which the District Court had organized its record, documents in the record but not contained in the appendices to the petition and this response are cited as follows. Discovery documents filed by the Respondents were placed into a record volume identified as Exhibit Folder 1, and referenced herein as [R. Exh. Folder 1-Page No.]. The

pleadings, briefs and orders filed in the District court record prior to the second appeal were placed into a record volume labelled as Exhibit Folder 2. References herein to those documents are as [R. Exh. Folder 2-Document No.]. Finally, documents in the District Court record after September 28, 1993, were placed into Record Volume One and referred to herein by [R.- Document No.]. Except for the West of England document entitled "IMBROS: FILE REVIEW" [R. Exh. Folder 1-29-34], these documents in the Record are not incorporated into the appendices to this brief, due to sheer volume. Should the Court request, Respondents will promptly file a separate appendix containing any such documents necessary to a proper disposition of the Petition for Certiorari.

(a) Statement of Proceedings Below

The Respondent, Stephen J. Morewitz, filed this action on June 26, 1985, as administrator of the estates of seven deceased seaman, seeking to collect a judgment for damages due their families as a result of their deaths in the sinking of the M/V IMBROS in 1975. The complaint, as amended on March 28, 1986, seeks to reach and apply the proceeds of a contract of marine P&I insurance issued by the Petitioner, the West of England Shipowners Mutual Protection and Indemnity Association (Luxembourg), which covered the M/V IMBROS at the time of its sinking. The judgment at issue was entered by the United States District Court for the Eastern District of Virginia in 1980, and was registered in the Southern District of Alabama under 28 U.S.C. §1963.

In the amended complaint, the Respondents alleged that if British law should apply to the case, they had standing to pursue the direct action under the Third Parties' (Rights Against Insurers) Act of 1930, which was then interpreted by British case law as applying to P&I insurance agreements. In

the alternative, the Respondents asserted standing to pursue the direct action under Alabama Code §§27-23-1 and 27-23-2, which establish the procedure for the execution of judgments covered under insurance policies.

On June 29, 1988, the Southern District of Alabama entered an order dismissing this case for lack of subject matter jurisdiction. On an appeal by the Respondents, the Eleventh Circuit reversed, holding that the claim was within the admiralty and maritime jurisdiction of the District Court. *Morewitz v. West of England Ship Owners Mut.*, 896 F. 2d, 495 (11th Cir. 1990)(*Morewitz I*). The Court also found that the Respondents had standing to pursue the direct action against the insurer under Alabama law, as this court had approved in *Maryland Casualty Co. v. Cushing*, 347 U.S. 409 (1954).

The case was reinstated in the District Court on May 22, 1990, and on October 17, 1990, the Petitioner filed a motion to stay pending arbitration. Ultimately, the District Court entered an order on April 13, 1992, which granted the motion to stay.

The Respondents prosecuted an appeal from that stay order, which was docketed in the Eleventh Circuit as No. 92-6432. After briefing and oral argument, the Eleventh Circuit entered an unpublished opinion, *Morewitz II*, 5 F. 3d 1498 (11th Cir. 1993), on September 28, 1993, finding that it lacked jurisdiction to hear that appeal from an interlocutory order granting a stay of proceedings under §3 of the Federal Arbitration Act, 9 U.S.C. §1, et seq. [Pet. App. D]

After remand, the District Court entered orders requiring the parties to show cause that they are proceeding with arbitration or be dismissed. The Respondents filed a motion for relief from the stay order, which requested in the alternative that the court certify the question for appeal under

28 U.S.C. §1292. [Resp. App. A] However, on June 22, 1994, the District Court entered its order denying the Respondents' motion and also entered a judgment dismissing the action, with prejudice. [Pet. App. B]

On an appeal by the Respondents from that judgment of dismissal, the Eleventh Circuit entered the opinion under review, reversing the dismissal order and remanding the case to the District Court for further proceedings. *Morewitz v. West of England, 62 F. 3rd 1356 (11th Cir. 1995)(Morewitz III).*

(b) Statement of the Facts

Because of the dismissal orders entered by the District Court, no trial or evidentiary hearing has been held on the merits of the Respondents' cause of action. The underlying facts involved in the case are largely undisputed, drawn from the record in the Eastern District of Virginia, from documents produced in discovery, or admitted by the Petitioner in response to requests for admissions. The facts relating to the underlying casualty and the insurance dispute are recited in the opinions issued by the Eleventh Circuit.

The Casualty

The Respondents are the families of deceased seamen who were employed as members of the crew of the M/V IMBROS when it loaded with cargo in the port of Mobile, Alabama, and departed on December 18, 1975, bound for a port in Canada. After leaving Mobile, the vessel sank off of the East coast of the United States with all hands lost.

The Petitioner, West of England is a mutual insurance association engaged in the business of providing marine P&I insurance coverage to owners and operators of vessels. Prior

to the sinking of the vessel, West of England issued a contract covering the vessel, insuring against losses sustained by reason of claims and judgments for personal injuries and deaths occurring aboard the vessel. The contract was in full force and effect at the time of the sinking.

The West of England certificate on the M/V IMBROS named Imbros Shipping Co., Ltd., as owner of the vessel. However, Imbros Shipping was a shell company owned by George Tsourinakis, a Greek citizen. The vessel was operated and controlled by General Development and Shipping Enterprises Company, Ltd., which was another shell company owned and controlled by Mr. Tsourinakis. The interest of Mr. Tsourinakis, as well as of both companies, were all one and the same, according to the deposition testimony of Mr. Tsourinakis which was taken in Greece, in 1977. His testimony also confirmed that General Development exercised all of the incidents of ownership of the vessel, and that Imbros Shipping existed only as a nominal title owner. [R. Exh. Folder 2-20 ***] The fact that the M/V IMBROS was part of the General Development fleet was also known to West of England, according to documents produced in discovery, all of which was then insured by West of England. [R. Exh. Folder 1].

Virginia Litigation

Beginning in 1976, Morewitz, as administrator, filed suits in the Eastern District of Virginia on behalf of the families of eleven seamen killed in the sinking of the M/V IMBROS, including the seven families who are Respondents in the present case. The defendants named in the Virginia suits included Imbros Shipping and General Development, both of which were represented and defended in that action by the Petitioner, West of England, who employed attorney John Crumpler, a member of the Seawells firm in Norfolk, Virginia.

[R. Exh. Folder 2-21; Resp. App. D]

In January, 1977, more than two years before trial, the District Court dismissed Imbros Shipping, Ltd., for lack of personal jurisdiction. The court found jurisdiction over General Development, based on its ongoing business conducted in the state of Virginia. Thereafter, the Petitioner continued to represent and defend General Development in the Virginia suit. In addition, the attorney employed by the Petitioner in Virginia affirmatively represented that General Development was its insured. At the deposition of Mr. Tsourinakis taken in August, 1977, an attorney representing the Respondents asked whether there was an insurance agreement in existence which would satisfy all or part of any judgment obtained in the suit. Mr. Crumpler, the attorney employed by West of England, instructed his client not to respond and made the following statement:

> "As the plaintiff well knows, the West of England has a contract with Mr. Tsourinakis' vessels and in fact I am employed by West of England to represent the owner and we object to any further questions about insurance as being totally irrelevant." [Tsourinakis Deposition at page 20, R. Exh. Folder 2-20 ***]

West of England refused throughout the pendency of the Virginia action to respond to the plaintiffs' attempts to discover insurance coverage.

The Petitioner has attempted to incorrectly characterize the result in the Virginia court as ". . . essentially, a default judgment against General Development . . ." In actuality, the court entered a sanction order, after General Development failed to respond to discovery as to ownership and management

of the vessel. That order merely found that General Development was owner *pro-hac-vice* of the M/V IMBROS and prohibited it from offering in evidence any of the documents subject to the plaintiffs' discovery. That order was of little practical effect, given the admission by Mr. Tsourinakis in his deposition that General Development had exercised total control over the vessel. West of England also knew this, corresponding only with General Development (G.D.S.E.) regarding the casualty. [Resp. App. D]

The other orders entered by the Virginia court confirm that otherwise the case was hotly contested on its merits. Conspicuously absent from the orders included in the Appendix to the Petition for Certiorari is the order entered by the court on July 27, 1979, after a trial of the case on the question of liability. In this order, which is attached as Respondents' Appendix B, the court denied motions to dismiss based on *forum non conviens*, found that the vessel was unseaworthy causing the deaths of the seamen, and found that General Development was not entitled to limitation of liability. Among the many facts found by the court were the following:

> "(8) For some time prior to the loss, it was well-known to General Development that the saltwater cooling system for the Vulcan reduction gears of the main engines had been leaking at inaccessible locations. Panagiotis Grivas, who had been chief engineer aboard the IMBROS from January 12, 1975 until he was injured on September 10, 1975, testified that he had reported both to the master and to the office of General Development that there was considerable leakage under the Vulcan gears of the main engines; that such a repair job was difficult and required that the gears of the main

> engines had to be taken down and other pipes above had to be removed; and that this job required both time and team from a shore workshop.
>
> Third engineer, Katopodis, who left the IMBROS in Mobile in December just prior to its last voyage, agreed that there was leakage from the pipe lines of the cooling system and that the leakage was not repaired before IMBROS left Mobile on December 13." [Resp. App. at 11a]

The court found several other unseaworthy conditions existing aboard the vessel prior to its departure in Mobile, and found that those conditions caused the sinking. Based on this evidence, the order found liability on the part of General Development and ordered that the case be set for trial on damages.

After a trial on damages, the Virginia court entered its memorandum opinion on April 3, 1980 [Pet. App. I] dismissing the claims of four plaintiffs and awarding damages in favor of seven families who are the Respondents in the present case. The court also entered judgment on April 3, 1980, awarding damages to the Respondents totalling $459,456.36. [Pet. App. H]

After entry of judgment in the Eastern District of Virginia, Mr. Crumpler prosecuted an appeal by General Development to the United States Court of Appeals for the Fourth Circuit, which affirmed in an unpublished opinion, *Morewitz v. General Development and Shipping Enterprises Co., Ltd.*, 660 F. 2d 491 (4th Cir. 1981) [Resp. App. C] Mr. Crumpler also filed a petition for certiorari on behalf of General Development, which was denied, 454 U.S. 939 (1981).

The judgment entered by the Eastern District of Virginia in favor of the families of seven deceased seamen, the Respondents herein, was never paid.

Waiver

The documents comprising the contract of insurance coverage on the M/V IMBROS include the certificate of enrollment and the "Rules" of West of England. The "Rules" or coverage provisions do contain a clause calling for arbitration in the event that disputes " . . . arise between an insured Owner . . . and the Association . . . . " However, the seamen who died in the sinking of the M/V IMBROS were not parties to that insurance contract; neither were their families who are the Respondents herein.

The documents which were obtained by the Respondents through discovery in the present action, including the West of England document entitled "IMBROS: FILE REVIEW [Resp. App. D], disclosed a number of questions upon which West of England might have asserted a right to arbitration with its insureds. On September 16, 1976, West of England corresponded with General Development regarding "calls" or retroactive premium billings due on the M/V IMBROS. [R. Exh. Folder 1-115] On January 20, 1977, the Eastern District of Virginia entered an order dismissing Imbros Shipping, which West of England now contends was its named insured. [R. Exh. Folder 1-49] At various times during 1977, West of England advanced funds to its representatives, for the purpose of paying settlements on claims other than those filed in the United States, without demanding that its insureds first make payment of the claims in order to seek reimbursement. [R. Exh. Folder 1-36-42, 53-60] On July 6, 1977, General

Development sent a telex to West of England containing proposals for payments on hull and cargo coverages, payment of legal fees and expenses, and for credits against "calls" due on the M/V IMBROS. [R. Exh. Folder 1-116]

On August 24, 1978, the Southern District of Virginia entered an order denying the motion to dismiss General Development. [R. Exh. Folder 1-61] On September 28, 1978, West of England circulated an internal memorandum relating to continued defense of the Virginia suit as if all "calls" had been paid, relating to continued coverage by West of England of the General Development fleet, and regarding funds advanced by West of England to pay settlements in all of the claims other than those filed in the United States. [R. Exh. Folder 1-67]

On October 23, 1978, West of England circulated another internal memorandum regarding the withdrawal from coverage of the remainder of the GDSE fleet, the fact that General Development was then no longer in existence, and regarding the "calls" due from General Development or George Tsourinakis. [R. Exh. Folder 1-87] On March 15, 1979, West of England sent telexes to General Development questioning its coverage as an insured, but threatening withdrawal of coverage under other club rules if General Development did not cooperate with discovery. [R. Exh. Folder 1-88]

On March 23, 1979, John Crumpler, the lawyer employed by West of England to defend the Virginia action, filed a motion to withdraw, citing lack of cooperation by General Development in complying with discovery orders. [R. Exh. Folder 1-90] On March 26, 1979, the Virginia Court entered an order holding that General Development was the owner pro hac vice of the M/V IMBROS. [R. Exh. Folder 1-95] On April 16, 1979, the Virginia Court entered a bench

memorandum denying the Crumpler motion to withdraw, which contains the first reference in the court record reflecting any question of coverage of General Development under the West of England P&I contract. [R. Exh. Folder 1-99] The motion to withdraw and the Virginia court orders were forwarded by Crumpler to West of England. [R. Exh. Folder 1-90] As of July 1, 1980, West of England made payment of one of the expenses of Crumpler's defense of the Virginia suit. [R. Exh. Folder 1-109]

During 1979 and 1980, Freehill, Hogan and Mahar (New York Counsel for West of England) transmitted the orders from the Eastern District of Virginia finding liability and awarding damages, the notice of appeal filed by Crumpler, the Fourth Circuit's affirmance of the District Court judgment, the petition for certiorari and the denial of certiorari by the Supreme Court. [R. Exh. Folder 1-33, 34, 80; Resp. App. D] On May 13, 1980, West of England sent a letter or telex to Joseph M. Allen, Jr., counsel for Petitioners, advising him to anticipate a suit in Alabama to enforce the Virginia judgment, five years before the present action was filed. [R. Exh. Folder 1-33; Resp. App. D]

In July, September and October, 1980, and also in October and November, 1982, West of England received letters from representatives of the plaintiffs, demanding payment of the judgment entered by the Eastern District of Virginia. [R. Exh. Folder 1-81-85, 103-107] No response to these demands for payment has been produced by West of England.

Since the sinking of the M/V IMBROS in 1975, West of England has not demanded arbitration with its insureds on any issue. During the pendency of the suits filed in Virginia, West of England did not demand arbitration with any of these Respondents or their representatives. Since the filing of the

present action in the Southern District of Alabama in 1985, West of England has not served an actual demand for arbitration upon the Respondents or their counsel in this suit.

On June 2, 1990, the British House of Lords issued its decision in *Firma C-Trade S.A. v. Newcastle P&I Assn.*, and *Socony Mobil Oil, Inc. v. West of England Ship Owners Mutual Ins. Assoc. (London) Ltd.*, 2 Lloyd's R. 191 (H.L. 1190), holding that the British statute known as the Third Parties (Rights Against Insurers) Act of 1930 did not apply to marine P&I insurance agreements, overruling prior cases holding that the statute applied to give an injured party a direct action against the insurer for the indemnity due under the contract. On October 17, 1990, the Petitioner filed its motion in the Southern District of Alabama, requesting a stay pending arbitration.

REASONS TO DENY THE WRIT

I. The Eleventh Circuit correctly held that it had jurisdiction to act on this appeal from a final judgment of the District Court dismissing the case with prejudice, an appealable order under 28 U.S.C. §1291. Such jurisdiction gave the court the power to review and correct orders which had previously been interlocutory, including the erroneous arbitration order herein. On this point there is no conflict among the circuits.

Beginning in October, 1990, the Petitioner has maintained that it is entitled to London arbitration (although we do not know the basis on which West of England disputes this claim, since it has never tendered a demand for arbitration). The Respondents have maintained that they are not required to submit to arbitration because they have not agreed to arbitrate their entitlement to collect their judgment,

they are not parties to a contract to arbitrate, and the Petitioner has long ago waived any right to arbitration with its own insureds. The Respondents have also candidly advised the District Court and the Eleventh Circuit that a London arbitration would be futile because the House of Lords had changed British law in June, 1990, with the decision issued in *Firma C-Trade SA v. Newcastle P&I Assn.*, and *Socony Mobil Oil, Inc. v. West of England Ship Owners Mutual Ins. Assoc. (London) Ltd.*, supra. It was obvious to all involved that a London arbitrator would apply British law to hold that West of England would not have any liability until its defunct insured paid the judgment, an impossibility. See *Psarianos v. Standard Marine, Ltd., Inc., 12 F. 3rd 461 (5th Cir.), cert denied, 114 S. Ct 2164, U.S. (1994).*

In *Morewitz II*, the Respondents had pursued an appeal from the order staying proceedings pending arbitration. Although the Eleventh Circuit ordered briefs and oral argument on the issue, it concluded that the stay order was an interlocutory order upon which appeal is prohibited under §16(b) of the Arbitration Act. In the instant appeal the Petitioner argued that the case was in the same posture, urging the Eleventh Circuit to ignore the fact that a final judgment of dismissal with prejudice had been entered. The Eleventh Circuit correctly rejected this argument, finding that it had jurisdiction over the appeal and the issues presented:

> "Pursuant to 28 U.S.C. §1291 (1988), '[t]he court of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court.' Decisions of the district court are final if they 'end the litigation on the merits and leave nothing for the district court to do but execute

> the judgment'. *Thomson McKinnon Sec., Inc. v. Salter,* 873 F. 2d 1397, 1399 (11th Cir. 1989)(quotation omitted). 'A dismissal with prejudice clearly is a decision that ends the litigation on the merits and leaves nothing for the court to do but execute a judgment." *Nichols v. Mobile Bd. of Realtors, Inc.,* 675 F. 2d 671, 673 (5th Cir. Unit B 1982)(quotations omitted). We conclude that we have jurisdiction to hear this appeal." [62 F. 3d at 1361; Fn. Omitted]"

The entry of final judgment renders all previous interlocutory decrees in the case final and appealable. It is axiomatic that the entry of the judgment of dismissal, with prejudice, vested the court of appeals with jurisdiction to review the whole case, including the prior interlocutory order staying proceedings pending arbitration, under the provisions of Rule 54(a) and 58 of the Federal Rules of Civil Procedure, Rules 3 and 4 of the Federal Rules of Appellate Procedure, and also under the provisions of 28 U.S.C. §1291. See, *Moore's Federal Practice, ¶¶54.01-54.04, ¶110.13[1] and ¶110.25[2].*

The Eleventh Circuit was also correct in reaching a result in this case which is consistent with its decision in *State Establishment for Agr. Prod. Trading v. M/V WESERMUNDE,* 838 F. 2d 1576 (11th Cir. 1988). Although that case did come before the effective date of §16 of the Arbitration Act, it was decided under the admiralty law doctrine restricting appeals from a District Court's stay of admiralty proceedings pending arbitration, established by this court in *Schoenamsgruber v. Hamburg Am. Line*, 294 U.S. 454 (1935). As the Eleventh Circuit noted in *State Establishment*, the Schoenamsgruber Doctrine:

> ". . . provides that while proceeding in Admiralty,

> an order compelling arbitration and staying the action pending arbitration pursuant to 9 U.S.C., §§1-14 is:
>
> (1) Not a final order under 28 U.S.C. §225 (now §1291);
>
> (2) Not an injunction under 28 U.S.C. §227 (now §1292(a)(1)); and,
>
> (3) Not an appealable interlocutory decree under the present §1292(a)(3)." [838 F. 2d at 1579]

Thus, §16 of the Arbitration Act was essentially a codification of the Schoenamsgruber Doctrine, at least insofar as it could apply to the present case. *State Establishment* also makes clear the significance of a judgment dismissing the case with prejudice. The party who has foregone arbitration takes nothing if the arbitration order is found to be correct and the dismissal affirmed on appeal.

The decisions from other circuits argued by the Petitioner demonstrate only different results reached in cases in a different procedural posture, involving different facts than the present case. In *Adair Bus Sales, Inc. v. Blue Bird Corp.*, 25 F. 3rd 953 (10th Cir. 1994), the defendant had filed a motion for stay pending arbitration and the District Court simply entered the wrong order, dismissing the complaint and ordering the parties to proceed to arbitration under the terms of their contract. There simply was no dismissal with prejudice which would terminate the litigation if affirmed on appeal. Likewise in *Perera v. Siegel Trading Co., Inc.*, 951 F. 2d 780 (7th Cir. 1992), the case was in precisely the same posture as *Morewitz II*, in which no final order or judgment of dismissal had been entered.

The other cases argued by the Petitioner are simply

inapplicable to the issue herein. *Stedor Enterprises, Ltd. v. Armtex, Inc.*, 947 F. 2d 727 (4th Cir. 1991) involves an order for arbitration in a case filed under §4 of the Arbitration Act, which is appealable under §16(a)(3) of the Act. The Petitioner represented that the Fourth Circuit here "has rejected the Eleventh Circuit's approach." Instead, the case cited by *Stedor*, *Id.* at 731, as most directly on point supporting its conclusion is *Thomson McKinnon Securities, Inc. v. Salter*, 873 F. 2d 1397 (11th Cir. 1989), also followed in *Morewitz III*, 62 F. 2d at 1361.

The decisions in *Humphrey v. Prudential Sec., Inc., 4 F. 3rd 313 (4th Cir. 1993)* and *American Casualty Co. v. L-J, Inc.*, 35 F. 3rd 133 (4th Cir. 1994) merely discussed the differences between appealability as to interlocutory orders in cases governed by §4, as opposed to cases governed by §3 of the Arbitration Act. Neither involved the appealability of a final order of dismissal, with prejudice.

The Eleventh Circuit correctly recognized that the Respondents did not need to perform a futile act at great expense as a condition to appellate review of this arbitration order. There simply is no conflict among the circuits on this issue.

II. The Eleventh Circuit correctly applied accepted principles of law as to waiver, when it found from undisputed evidence in the record that the Petitioner had waived any right to arbitration with its own insured many years ago, to the prejudice of the Respondents. The case does not involve a mere failure to make a pre-litigation demand to arbitrate.

As it had done in the courts below, West of England continues in its petition to assert that its conduct with respect to its own insureds amounts to nothing more than a failure to

make a pre-litigation demand to arbitrate. The Petitioner also continues in its effort to direct the attention of the court away from the undisputed facts in this case.

We obviously are not dealing with a case in which an insurance company has made a timely demand for arbitration with its insureds as to a coverage question, at the first opportunity to do so, as was presented in *Psarianos v. Standard Marine, Ltd., Inc.*, 728 F. Supp. 438, 449-453 (E.D. Tex. 1989), arbitration award affirmed, 12 F. 3rd 461 (5th Cir. 1994), cert. denied, 114 S. Ct. 2743, U.S. (1994). Also, we agree with the statements made in that case and many others that mere delay in demanding arbitration does not, by itself, constitute waiver. However, the present action presents far more than an eight month delay between the filing of a suit and the demand for arbitration which was involved in *Tenaco Resins, Inc. v. Davey Intern., A.G.*, 770 F. 2d 416 (5th Cir. 1985).

The documents which the plaintiffs were able to obtain by discovery in the District Court clearly demonstrated that the conduct of West of England had amounted to much more than "mere delay" in asserting a claimed right to arbitration. [R. Exh. Folder 1; Resp. App. D] The Eleventh Circuit was acutely aware of the record in this case and pointed out that by the time the Petitioner filed a motion for stay pending arbitration (October 17, 1990) it had been fifteen years since the M/V IMBROS sank, and more than fourteen years since the original suits were filed in Virginia. It had been ten years since the entry of final judgment in Virginia and more than nine years since appeals to the Fourth Circuit and the Supreme Court were exhausted, and it had been more than five years since the filing of the present suit for the enforcement of the Virginia judgment. During all of that time, West of England had not tendered a demand for arbitration of any issue to Imbros Shipping, General Development, George Tsourinakis, the

administrator of the estates of the deceased seamen or their families, counsel representing the plaintiffs in Virginia and in Greece, nor to the counsel for Plaintiffs-Respondents in the present action. The Eleventh Circuit correctly recognized that the Petitioner had not made the slightest effort at demonstrating that it was "not in default in proceeding with such arbitration", the condition for issuance of a stay order under §3 of the Arbitration Act.

The undisputed facts contained in the record before the Eleventh Circuit are set forth in the statement of facts herein (*supra* at pp. 8-11) and will not be repeated here for the sake of brevity. Since the Petitioner has never served a specific demand for arbitration, nor has it filed an answer to the complaint in this case, we do not know which particular issues it might contend to be subject to arbitration in this case. However, the undisputed facts in the record before the Eleventh Circuit demonstrated that West of England passed on many opportunities to request arbitration with its own insureds, dating back to the sinking of the M/V IMBROS twenty years ago.

As to the Respondents themselves, the Petitioner's opportunities to request arbitration did not commence with the 1985 filing of the present suit, nor with the 1990 remand to the District Court from the initial appeal in this case. Beginning in 1980, American lawyers and a London Solicitor representing the Petitioners made numerous demands directly to West of England for payment of the judgment rendered by the Eastern District of Virginia. These demands were repeated in 1982. The Petitioner did not request arbitration with the Petitioners then, or at any other time. Instead, the Petitioner simply ignored these requests and instructed its local attorneys to be prepared for possible action by Morewitz in Alabama in 1980. [Resp. App. D]

The Eleventh Circuit recognized that it was dealing with an insurance company which had clearly sat on its rights for fifteen years, and had done so because it would have had no advantage in a London arbitration, given British law in effect at the time. The Eleventh Circuit also correctly recognized that the Respondents were clearly prejudiced by this delay:

> "In light of the strong federal policy favoring arbitration, we also must examine whether Morewitz has been prejudiced by West of England's delay in demanding arbitration. The House of Lord's decision affecting Morewitz's right to arbitrate this dispute in England was not announced until nearly a decade after the Fourth Circuit affirmed General Development's liability for the crew members' deaths. *Firma C-Trade S.A. v. Newcastle Protection and Indem. Ass'n.*, 2 Lloyd's Rep. 191 (H.L. 1990). Moreover, Morewitz instituted the present lawsuit in 1985, five years before the decision from the House of Lords. We conclude that West of England had ample opportunity to demand arbitration well in advance of the decision that significantly changed the legal position of the parties to the prejudice of Morewitz." [62 F. Supp. at 1366]

In so holding, the Eleventh Circuit reached a fact-specific decision based upon principles of law which are totally consistent with the decisions of other circuits.

Contrary to the assertions of the Petitioner, given the undisputed facts before the Eleventh Circuit, the result is hardly a decision which ". . . robs the parties to an arbitration agreement of the certainty that the Act was designed to provide and which is essential in international transactions." Given the

fact-specific inquiry required by the principles of waiver and estoppel, the Eleventh Circuit decision is also clearly not a ". . . frontal assault upon the philosophical underpinnings of the Arbitration Act . . . "; nor is this decision at odds with the principles of law applied by other circuits in cases involving different facts.

For that reason, the Petitioner's reliance on *General Guaranty Ins. Co. v. New Orleans Gen. Agency, Inc.*, 427 F. 2d 924 (5th Cir. 1970), is misplaced. In that case, the defendant had asserted a right of arbitration at its earliest possible opportunity, in the first pleading filed in response to the complaint. The Fifth Circuit held:

> "[New Orleans General Agency] did not lose its rights to arbitration by pleading alternatively that the contract had been abandoned and that court proceedings should be stayed pending arbitration. The propriety and desirability of having an initial judicial determination of whether an arbitration contract exists is well recognized." [427 F. 2d at 928]

The court further found no prejudice to the party opposing arbitration, an essential element of waiver.

Likewise, in *Lubrizol Intern., S.A. v. M/V STOLT ARGOBAY*, 562 F. Supp. 565 (S.D.N.Y. 1982), the District Court found that there had been conduct inconsistent with the right of arbitration, by the party seeking a stay order. The court also found that there had been no prejudice, and therefore no waiver of arbitration, because it is "the presence or absence of prejudice which is determinative of the issue." *[Id.* at 573]. Further, the decisions in *Stifel Nicholaus & Co., Inc. v. Freeman*, 924 F. 2d, 147 (8th Cir. 1991), and *Southside*

Internists Group v. Janus Capitol Corp., 741 F. Supp. 1536 (N.D. Ala. 1990), each involved timely requests for arbitration and an absence of prejudice to the opposing party. Those decisions are totally consistent with the Eleventh Circuit in the present case.

The mere fact that other courts have reached different results, based upon different facts, is far from a conflict among the circuits which would warrant the attention of this court.

III. Under appropriate Federal admiralty choice of law principles, the Eleventh Circuit correctly held that state procedural law should be applied to this action in aid of execution on a judgment.

In a novel issue not previously raised in the courts below, the Petitioner now argues that the Eleventh Circuit should be held in error for an alleged failure to apply federal admiralty conflict rules which determined whether United States substantive law may be applied to the claim of an injured seaman, citing *Lauritzen v. Larsen*, 345 U.S. 571 (1953). These substantive choice of law principles determine, for example, whether the Jones Act, 46 U.S.C. §688, may be properly applied in the injury claim of a foreign seaman. Interestingly, the Petitioner's lawyer representing General Development in Virginia lost on this issue in his appeal of the original judgment to the Fourth Circuit. [Resp. App. C] While properly applied in the underlying suit, these substantive choice of law principles are themselves foreign to a proper analysis of whether state law should be applied in a direct action against an insurance company in a suit in aid of execution on a judgment.

It is obvious that the Eleventh Circuit did apply the proper analysis in determining that the Respondents had standing to pursue their claim against the Petitioner under Alabama law, a point which was essentially unchallenged in the

courts below. In *Morewitz I*, the Eleventh Circuit made note of the Petitioner's reference to British law, in a passage which was quoted in substantial part in *Morewitz III*, 62. Fd. at 1363, and correctly set out the proper choice of law analysis:

> "But we are not so sure that an extended inquiry into choice of law rules would show that the English statute is applicable. Although it seems clear that English law would govern in construing the existence and amount of defendant's liability under the marine insurance contract, it is not as clear, when the suit is being brought in Alabama, that English procedural law would apply. The cases were have reviewed, although not addressing the choice of law issue directly, indicate that the forum state's law may be the applicable law for purposes of applying any direct action statute. See E.B. *Maryland Casualty Co. v. Cushing*, 347 U.S. 409, 74 S. Ct. 608 98 L. Ed. 806 (1954); *Steelmet, Inc. v. Caribe Towing Corp.*, 779 F. 2d 1485 (11th Cir. 1986), modifying 747 F. 2d 689 (1984); *Nebel Towing*, 419 F. 2d 230; *Aetna Casualty, supra; Fidelity & Casualty, supra; Ingram Indus, supra,* at 1301 quoting *Burke v. Massachusetts Bonding & Ins. Co.*, 209 La. 495, 24 So. 2d 875 (1946)); *See also Wilson Boat, supra* (discussing marine insurance in general); *Gulf Tampa Drydock Co. v. Great Atlantic Ins. Co.*, 757 F. 2d 1172, 1174 (11th Cir. 1985) (same).
>
> Thus, the choice of law question could conceivably affect plaintiff's standing, and consequently, the Court's Article III power to decide the case. See U.S. Const. Art. III, §2. We need not concern ourselves with it now, however, *as plaintiff has also alleged that he has standing under Alabama law should it apply, see Plaintiff's Amended Complaint, Rec. 25, at 28 (referring to Ala. Code §§ 27-23-1 to -2), and as defendant has not seen fit to*

argue otherwise." [896 F. 2d at 499-500, Fn. 5; emphasis added]

In *Morewitz III*, the Eleventh Circuit also applied the proper choice of law analysis to determine that the procedural law of the forum state properly applied to this suit in aid of execution on the judgment:

> "Federal admiralty law neither authorizes nor forecloses a third party's right to directly sue an insurance company. *Steelmet, Inc. v. Caribe Towing Corp.*, 779 F. 2d 1485, 1487 (11th Cir. 1986), *modifying* 747 F. 2d 689 (1984). 'A state may, however, create a direct action against a maritime insurer, at least where the state action is not in conflict with any feature of substantive admiralty law or any remedy peculiar to admiralty jurisdiction.' *Steelmet*, 779 F. 2d at 1487; see *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 320-21 75 S. Ct. 368, 374, 99 L. Ed. 337 (1955) (in the absence of a controlling federal admiralty principle, state law can be applied in an admiralty case). The conflict in the present case lies not with the federal admiralty law, but with whether the English bankruptcy statutes or the Alabama direct action statutes apply.
>
> We recognize that characterizing direct action statutes as either procedural or substantive is problematic, particularly in the context of admiralty jurisdiction. *See State Towing Corp. of India v. Assuranceforeningen Skuld*, 921 F. 2d 409, 414-15 (2d Cir. 1990). 'However, in order to promote orderly administration of justice and the integrity of courts' local rules, some laws are deemed procedural and not subject to choice of law rules.' *Id* at 416; *see also* Restatement (Second) of Conflict Laws §122 emt. a (1971) (discussing a state's right to apply its

> own procedural law). Therefore, '[b]efore engaging in choice of law analysis, we first address [the] argument that [Alabama's] direct action statute is procedural and therefore not subject to choice of law rules.' *State Trading*, 921 F. 2d at 414" [62. F. 3rd at 1362-1363; footnotes omitted]

The Petitioner argues that a conflict among the circuits is demonstrated by comparing the result in this case with the decision in *State Trading Corp. of India v. Assuranceforeningen Skuld*, 921 F. 2d, 409 (2nd Cir. 1990). In so doing, the Petitioner ignores the fact that *State Trading* was dealing with a Connecticut statute, which the Connecticut courts had interpreted as substantive, rather than procedural. *Id* at 415-416. The Eleventh Circuit recognized this and also recognized that the courts of Alabama have uniformly construed Alabama Code §§27-23-1 and 27-23-2 to be procedural in that it "merely enables the person suffering the initial damages out of which grows the loss to the insured, to acquire a lien against the loss and the right to damages or indemnity arising under the policy, and to enforce it in his own name." *Macey v. Crum*, 249 Ala. 249, 30 So. 2d 666, 668 (1947). See also, *Fleming v. Pan American Fire & Cas. Co.*, 495 F. 2d 535 (5th Cir. 1974), another case which is totally consistent with the result below and which also does not create the conflict among the circuits alleged by the Petitioner.

State Trading is simply another case in which different facts have mandated different results. In arguing a conflict among the circuits, the Petitioner avoids mention of the fact that the parties to the underlying judgment in *State Trading* had absolutely no contact with the state of Connecticut. The vessel had not been in the state, neither the vessel owner nor the cargo shipper had done business in the state, and the vessel was not on a voyage to or from a port in Connecticut when it sank

off the coast of Africa. In the absence of any conduct in the state the Second Circuit declined to apply Connecticut law.

In *Morewitz*, to the contrary, the M/V IMBROS had called upon the port of Mobile, Alabama, before commencing its final voyage. The vessel was insured by West of England while in that port and when it departed. Multiple acts of negligence on the part of the owners and operators of the vessel, occurring in the port of Mobile, Alabama, were the basis for the denial of limitation of liability and also the basis for the award of damages against General Development. Indeed, given the numerous unsafe conditions found by the Eastern District of Virginia [Resp. App. C] it is a mere happenstance that the vessel managed to escape state territorial waters before sinking.

There is absolutely no question that the Southern District of Alabama would have had jurisdiction and venue in the original suit against Imbros Shipping and General Development. Likewise, there is no question but that the District Court has jurisdiction now to enforce the judgment which has been registered in the Southern District of Alabama under 28 U.S.C. §1963, which provides that the judgment shall be enforced in like manner as a judgment of the District Court. Rule 69 of the Federal Rules of Civil Procedure specifically provides that the District Court shall apply the practice and procedure of the state in which the District Court is held, to an action in aid of execution on a judgment such as the present case.

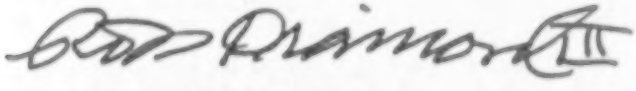
There is also no question as to in personam jurisdiction over the Petitioner itself. West of England relishes in referring to itself as a "Luxembourg" corporation, but fails to disclose that it conducts its insurance business by agents and attorneys on a daily basis in Mobile, Alabama, and has done so for decades.

The application of state law to allow the Respondents standing to pursue this direct action to reach and apply the proceeds of the insurance contract, in aid of execution on their judgment, is totally consistent with the decisions of this court in *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955), and *Maryland Casualty Co. v. Cushing*, 347 U.S. 409 (1954). The choice of law principles applied by the court below are likewise consistent with the standards applied in other circuits.

CONCLUSION

There being no conflict among the circuits on any issue material to the result below, nor any other issues herein which otherwise warrant the attention of this court, the petition for writ of certiorari should be denied.

Respectfully submitted,



ROSS DIAMOND III
Diamond, Hasser & Frost
Post Office Drawer 40600
Mobile, Alabama 36640-0600
(334) 432-3362
Counsel of Record for Respondents

APPENDIX TABLE OF CONTENTS

A. Motion for relief from stay order pending arbitration, filed on June 10, 1994..... 1a

B. Memorandum Opinion and Order of United States District Court, Eastern District of Virginia, July 27, 1989..... 4a

C. Opinion of United States Court of Appeals, Fourth Circuit, April 23, 1981..... 19a

D. West of England Document entitled "IMBROS: FILE REVIEW"..... 22a

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CIVIL ACTION NO. 85-0855

STEPHEN J. MOREWITZ, as administrator, et al.,
Plaintiffs,

vs.

THE WEST OF ENGLAND SHIP OWNERS MUTUAL PROTECTION AND INDEMNITY ASSOCIATION (LUXEMBOURG),
Defendants.

MOTION FOR RELIEF FROM STAY ORDER

COME NOW the plaintiffs in the above cause and respectfully move the court for the entry of an order granting them relief from the order staying this case pending arbitration, entered on January 31, 1991, and also the order entered, after reconsideration, on April 13, 1992, which granted the defendants' motion to stay these proceedings pending arbitration. As grounds, the plaintiffs show unto the court as follows:

1. It is the position of the plaintiffs that they are not bound by the arbitration clause contained in the insurance contract between West of England and the vessel owners in this case.

2. It is further the position of the plaintiffs that the defendant waived any right that it may have had to compel its own insureds to arbitrate coverage questions, by defending its insureds in Virginia without demanding arbitration on any coverage questions, and by its actions thereafter.

3. The defendant insists that it is entitled to arbitration of this action in London. Its only reason for doing so is to seek the protection of a provision of British law under which West of England would have no obligation to make any payment until its insureds satisfied the judgment obtained by the plaintiffs in the United States District Court for the Eastern District of Virginia.

4. The vessel owners in this case were defunct and insolvent before the underlying suit went to trial in Virginia, and before the entry of the judgment which is the basis of this suit. Therefore, payment by the vessel owners was an impossibility before the accrual of the cause of action asserted in this case. Application of British law to this suit to enforce the judgment of the Eastern District of Virginia would be grossly unfair to the plaintiffs, and would deny the plaintiffs due process of law.

5. United States law, specifically the procedural and

substantive law of the forum state, should be applied in this suit on a judgment to collect the proceeds of a marine insurance policy.

WHEREFORE, the plaintiffs respectfully move the court for the entry of an order granting them relief from the stay which has been entered herein, so as to permit the plaintiffs to pursue their cause of action on the merits to conclusion in this court. In the alternative, the plaintiffs respectfully move the court for the entry of an order certifying this question for appeal under 28 U.S.C. §1292(b) as involving a controlling question of law as to which there is substantial ground for difference of opinion and finding that an immediate appeal from an order on this motion may materially advance the ultimate termination of this litigation.

/s/
Ross Diamond III
DIAMOND, HASSER & FROST
Post Office Drawer 40600
Mobile, Alabama 36640

CERTIFICATE OF SERVICE

I certify that I have served a copy of the foregoing upon Joseph M. Allen, Jr., JOHNSTONE, ADAMS, BAILEY, GORDON and HARRIS, Post Office Box 1988, Mobile, Alabama 36633, by depositing a copy of the same in the United States Mail, properly addressed and first class postage prepaid this 10th day of June, 1994.

/s/
ROSS DIAMOND III

84:18

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NEWPORT NEWS DIVISION

Civil Action No. 76-103-NN, No. 77-63-NN,
No. 77-95-NN, No. 77-170-NN

STEPHEN J. MOREWITZ, ADMINISTRATOR, ETC., *et al.*,
Plaintiffs

v.

IMBROS SHIPPING CO., LTD., *et al.*,
Defendants.

MEMORANDUM OPINION

BACKGROUND

This matter grows out of the unexplained sinking of the SS IMBROS, with loss of all hands, somewhere off Bermuda in December, 1975. She was carrying a cargo of railroad ties from Mobile, Alabama to Port Cartier, Quebec, Canada. Before the Court at this time is the issue of the liability of the remaining defendant, General Development & Shipping Enterprises Co., Ltd. (hereinafter "General Development"), on the wrongful

death claims asserted by the personal representative of the lost crewmen.

The vessel owner of record, Imbros Shipping Co., Ltd., was dismissed before trial for lack of jurisdiction. Contramar, S.A. time charterer or IMBROS and Continental Lines, S.A., are considered one and the same corporation, (hereinafter "Contramar"), for purposes of this action. Neptune International Shipping, Ltd. (hereinafter "Neptune") was subcharterer at the time of the casualty. After hearing plaintiff's evidence, the Court GRANTED motions for directed verdicts on behalf of Contramar and Neptune, and leaving General Development as the sole defendant before the court. General Development is a Cypriot corporation which "managed" the SS IMBROS. General Development handles only vessels owned by George Tsourinakis, a Greed citizen and resident, and Tsourinakis and his wife are apparently the sole shareholders of General Development.

Plaintiffs file suit alleging a plethora of causes under 46 U.S.C. §§596-601, 608 under 46 U.S.C. §761 et seq.; under 54 Stat. 1693; under the general maritime law; under the laws of Cyprus, under the British Fatal Accidents Act; and under any other treaty, convention, statute or law which might apply.

By order dated August 28, 1978, the Court found that General Development, charged in this suit as an agent of SS IMBROS, had itself transacted sufficient business in Hampton Roads in Eastern Virginia to satisfy process and to warrant its being sued here. Plaintiffs' claim against General Development

deal with its responsibility in the condition, stability, and manning of the IMBROS, and its degree of control of the vessel, whether of sufficient totality as to saddle that defendant with liability.

In an order dated march 26, 1979, the Court, under authority of Rule 37(d) of the Federal Rules of Civil Procedure, in light of General Development's absolute failure to respond to the discovery orders of this Court, found that:

(1) General Development was to be considered as the owner pro hac vice of the IMBROS at the time of the loss;

(2) General Development, at trial, was precluded from introducing evidence pertaining to the documents properly sought from General Development and refused by it dealing with the condition of the SS IMBROS, its stability, maintenance of its machinery and equipment.

(3) The failure of General Development to respond to discovery carried with it in the adverse inference that the information and documents sought would have been unfavorable to General Development.

The law of admiralty controls and the rights must be governed by federal law. When we consider what law should be applied, difficulties arise. At the time of her loss, the IMBROS had a multinational crew, including ten Greeks, three Nigerians, tow Pakistanis, one Egyptian, and one Jordanian. General Development and IMBROS were both Cypriot

corporations owned by George Tsourinakis, a Greek citizen. Defendant contends that the Court should apply the law of Greece; that under that law Greek courts would not apply the same legal presumptions as American courts when statutory violations and/or safely (sic!) are proven. Without reaching the applicability of Greek law, which we seriously doubt, General Development has cited no Greek authority indicating that the statutory violations and safety violations herein found to exist give rise to different presumptions under Greek case law than under United States case law.

The Fourth Circuit in *Heredia v. Davies*, 12 F. 2d 500 (1926) held that in the absence of specific proof to the contrary the presumption is that foreign law regarding seamen is the same as United States law:

> Furthermore, in absence of proof to the contrary, the presumption is that the law of Peru with regard to the right of recovery is the same as the law of this county, the lex fori . . . There was no showing that the law of Peru denies recovery to a seaman injured as a result of the unseaworthiness of the vessel upon which he is serving. Supra at 501.

Heredia v. Davies, supra, was reaffirmed by the Fourth Circuit in *The Arizpa*, 63 F. 2d 42, 43 (4th Cir. 1933); See also, *Todd Shipyard Corp. v. The City of Athens*, 83 F. Supp. 67 (D.Md. 1949), *Middleton v. Luckenbach s. s. Co.* 70 F. 2d 326 (2nd Cir. 1934). In the absence of specific proof that laws of

Greece and/or Cyprus regarding seamen, are different from American law, the wrongful death claims of the plaintiffs will be governed by American law.

FINDINGS OF FACT

(1) The claims herein arise out of the disappearance in the Bermuda Triangle on or about December 18, 1975 of the SS IMBROS and her crew of 18.

(2) It is stipulated, and we find as fact, that the Cyprus SS IMBROS was a general cargo vessel built in Belgium in 1963. It was 97.01 meters in length overall and 87 meters in length between perpendiculars. Its extreme breadth was 14.91 meters It had a moulded depth of 8.82 meters. It had two hatches and was powered by two diesel engines geared to a single propeller shaft. Its gross tonnage was 3,426 tons, its net tonnage was 1,942 tons and its deadweight tonnage was 5,016 tons.

(3) It is stipulated, and we find as fact, that the SS IMBROS sailed form Mobile, Alabama, for Port Cartier, Quebec, Canada, at 1715 hours, December 13, 1975, with draft 23'8" forward and draft 25'04" aft, with 240 metric tons of diesel fuel and 90 metric tons of water.

(4) It is stipulated, and we find as fact, that on December 13, 1975, SS IMBROS loaded 1,416 bundles containing 35,400 railroad ties weighing 7,221,600 pounds, or 3,223.93 long tons. Each railway tie required four cubic feet to

stow (dimensions 8'6" x 9" x 7") and weighed 245 pounds. The ties were shipped in two ton bundles. These bundles were loaded two tiers high and stowed for and aft abreast in hatches No. I and 2 and a total of eighty-three (83) bundles were stowed on the weather deck on the hatch squares at hatches No. 1 and No. 2.

(5) It is also stipulated, and so we find, that on December 16, 1975, SS IMBROS sent a wireless message to defendant General Development about leakage in the salt water cooling system of the Vulcan reduction gears of her main engines. Two days later, on December 18, 1975, about 0400 local time, SS IMBROS sent out an SOS or Mayday message, giving two different positions:

(a) 31°40'N. 78°47'W.(b) 31°40'N. 77°40'W.

Nothing further was ever heard from the SS IMBROS.

(6) We find that the SS IMBROS was not properly manned at the time of the loss. United States requires that a vessel the size of the IMBROS must have the following licensed officers: one master; one chief mate; one second mate; one third mate; one chief engineer; one second engineer; two third engineers; one radio officer. In a request for admissions served on May 10, 1977 and admitted on June 21, 1977, General Development admitted that in December, 1975, Cyprus Merchant Shipping regulations required that the crew of the Cyprus SS IMBROS be composed of: one master; two mates; six able-bodied seamen; two deck boys; three engineers; three

engine ratings; one wireless operator; and one cook. The IMBROS, in its manning personnel, was in violation of both the United States law and the law of Cyprus at the time of the loss. Further, Article 3, paragraph 1 of International Convention Concerning Professional Capacity of Merchant Marine Masters and Officers, 54 Stat. 1683 provides:

> Art. 3.1. No person shall be engaged to perform or shall perform on board any vessel to which this convention applies the duties of master or skipper, navigating officer in charge of a watch, chief engineer, or engineer officer in charge of a watch, unless he holds a certificate of competency to perform such duties, issued or approved by the public authority of the territory where the vessel is registered.

Stavros Ikonomopoulos, an engineer on IMBROS, testified that he was not replaced as one of the two third engineers in December when he was discharged. The radio officer was also discharged from said vessel and was not replaced. The vessel was short at least one mate, one engineer, and a radio operator.

(7) We find that at the time of the loss the only officer holding a license for the capacity in which he was serving was the master. Stamatis, the chief mate, had only a license as a s3econd mate and Passalis, the chief engineer, had only a second engineer's license. None of the others serving as officers had any licenses whatsoever. (agreed exhibits 27, 59, 60)

(8) For some time prior to the loss, it was well known to General Development that the salt water cooling system for the Vulcan reduction gears of the main engines had been leaking at inaccessible locations. Panagiotis Grivas, who had been chief engineer aboard the IMBROS from January 12, 1975 until he was injured on September 10, 1975, testified that he had reported both to the master and to the office of General Development that there was considerable leakage under the Vulcan gears of the main engines; that such a repair job was difficult and required that the gears of the main engines had to be taken down and other pipes above had to be removed; and that this job required both time and a team from a shore work shop.

Third engineer, Katopodis, who left the IMBROS in Mobile in December just prior to its last voyage, agreed that there was leakage from the piplines of the cooling system and that the leakage was not repaired before IMBROS left Mobile on December 13.

(9) We also found that due to pressure from General Development to cut down on expenses of maintenance and repair, the radar of said vessel had been in operative for at least a year; that the auxiliary pumps of both main engines needed packing rings and were in poor condition, resulting in the loss of large amounts of fresh water; and that the bilge pump pipelines were frozen solid with residues of phosphate and cement. Thus with a leaky vessel, tow alternate sets of possible pump help were out of commission.

(10) The radio message to General Development from the Master of the S/S IMBROS on December 16, 1975 is the last evidence of the lack of maintenance and repair of the said vessel:

212714 GT GR
9935/B THRADIO
1039
SS IMBROS/ 5B2440 SVA 1 85 (Words) Date: 16 Time: 1000 CRETASHIP PIRAEUS (SIC)

FOLLOWING DEPARTURE MOBILE WE HAVE LEAKAGE AT INACCESSIBLE LOCATION IN PIPE LINE FROM AUXILIARY PUMP OF MAIN ENGINE TO COOLING SYSTEM OF VOULKAN (SIC)

TO REPAIR REQUIRED DISMANTLING REDUCTION GEARS OF MAIN ENGINES AS WELL AS (DISMANTLING) MANY OTHER PIPES WHICH COVER IT. DURATION OF SUCH A JOB CAN NOT BE ESTIMATED. WE CONTINUE VOYAGE WITHOUT REPAIRS.

THERE IS DANGER FOR THE LEAKAGE TO INCREASE. WE ARE COOLING VULKAN WITH FIRE PUMP.

ALSO ANOTHER LEAKAGE IN AUXILIARY AIR COMPRESSOR PIPE LINE SHORTCIRCUITED NO.

1 GENERATOR AND PUT IT OUT OF OPERATION. WE TRY REPAIRING IF WE CAN.

DUE TO SICKNESS OF SECOND AND THIRD ENGINEERS SEND A THIRD (ENGINEER) TO PORT CARTIER. ALSO SEND REPLACEMENT FOR CHIEF ENGINEER WHO IS RESIGNING. 400 POUND REMITTANCE BY PASALIS NOT TO BE PAID.

COL PASSALIS REMITTANCE 400 POUNDS NOT BE PAID
1039
+
212714 GT GR
9935/5 ATHRADIO

(11) We find as fact that the IMBROS had a high derrick amidship which created some tendency to list, especially with the placing of cargo on one side of the deck or other. This center of gravity was increased with eighty-three (83) bundles of railroad ties stowed on the weatherdeck. The stability of the vessel was thus unaffected.

(12) The U.S. Department of Commerce provided a true copy of the weather observations for all available vessels near the position on the date in question, and of those thirty (30) ships that reported, the highest winds were 25-35 knots, with seas of 2-4 meters. We find that a seaworthy vessel should not sink under ordinary circumstances in such weather.

CONCLUSIONS OF LAW

(1) The failure by General Development to provide properly licensed officers was not only negligence, it was also a violation of statutory duty. Such a violation invokes *The Pennsylvania Rule*. The rule of *The Pennsylvania Rule* was born of a collision between two ships:

> . . . [W]hen, as in this case, a ship at the time of the collision is in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster. In such a case, the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been. Such a rule is necessary to enforce obedience to the mandate of the statute.
> 86 U.S. (19 Wall.) 125, 136 (1873).

(2) The Second Circuit found that the "Pennsylvania rule" is still alive and well.

> That rule's vitality and force were not in any degree affected by *United States v. Reliable Transfer Co.* 421 U.S. 397 (1975), which overrules *The Pennsylvania* only in so far as it abolished the Mutual Fault-Equal Contribution rule. *Tug Ocean Prince v. United States* 584 F. 2d 1151 (2nd Cir. 1978).

The rule creates a shift in the burden of proof as to causation *Garner v. Cities Service Tankers Corp.*, 456 F. 2d 476 (5th Cir. 1972), *Green v. Crow*, 243 F. 2d 401 (5th Cir. 1957). General Development has not over come this statutory presumption of causation.

(3) (a) We find that the leaking condition of the salt water cooling system, a condition requiring this (sic!) continued use of a jury-rig of the fire pumps was well known to General Development and systematically ignored by it. This caused the vessel to be unseaworthy.

(b) We find that the clogged bilge pumps, necessary to maintain stability in a seaway, a stability impaired by a massive derrick and tons of deck cargo, a condition known to General Development, was further evidence of unseaworthiness of the IMBROS.

(c) We find that the absence of a qualified radioman was a serious undermanning of the vessel and may have been reason for the faulty position reporting. This was unseaworthiness.

(d) In wrongful death actions sounding in negligence under the Death on the High Seas Act, 46 U.S.C. §761 et seq., or sounding in unseaworthiness under general maritime law, when the exact circumstances of the casualty are unknown, the Supreme Court has permitted the finder of fact to supply by inference many of the elements normally required to be proven by the claimant. *Admiralty Towing Co. v. Woolen*, 290 F. 2d

641, 649 (9th Cir. 1961).

(5) An accident may be inferred from the fact of disappearance, and the "where" and "when" of the accident need not be fixed exactly. *Shulz v. Pennsylvania R.R. Co.*, 350 U.S. 523 (1956), *Roth v. Bird* 239 F. 2d 257 (5th Cir. 1956). The trier of fact must be afforded substantial latitude in making its determination even though the evidence is slight and even though the reviewing court might have arrived at a different conclusion. *Shulz v. Pennsylvania R.R. Co.*, supra; *Sadler v. Pennsylvania R.R. Co.*, 159 F. 2d 784 (4th Cir. 1947).

(6) As to the defendant's negligence constituting the legal cause of the accident, "slight evidence" is sufficient to long as the inference is that which reasonable, prudent men might reach on the basis of the evidence. By use of an extension of the "res ipsa loquitur" principle regarding "permissible inferences from unexplained events," the finder of facts may infer the requisite legal causation. *Shulz v. Pennsylvania R.R. Co.*, supra; *Roth v. Bird*, supra; see *Sadler v. Pennsylvania R.R. Co.*, supra.

(7) On the basis of these cases and on the facts found heretofore, the Court concludes that the IMBROS was unseaworthy, that the defendant had knowledge of such condition, and that the defendant, General Development, is liable for the wrongful death claims arising from the loss of the SS IMBROS.

(8) Contemporaneously with the filing of this memorandum, the Court will enter an order in favor of the plaintiffs and finding liability on the part of General Development.

/s/
John A. McKenzie
Chief Judge

Norfolk, Virginia July 27, 1979

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NEWPORT NEWS DIVISION

Civil Action No. 76-103-NN, No. 77-63-NN,
No. 77-95-NN, No. 77-170-NN

STEPHEN J. MOREWITZ, ADMINISTRATOR, ETC., *et al.*,
Plaintiffs

v.

IMBROS SHIPPING CO., LTD., *et al.*,
Defendants.

ORDER

In accord with the findings of fact and conclusions of law this day filed, it is the judgment of this Court that General Development and Shipping Enterprises Co., Ltd., is liable to the several plaintiffs herein for damages.

The plaintiffs and defendant General Development and Shipping Enterprises, Co., Ltd., shall appear before the docket clerk of this court within fifteen (15) days to set the case down for assessment of damages.

It is so ORDERED.

/s/
John A. McKenzie
Chief Judge

Norfolk, Virginia Dated July 27, 1979

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 80-1321

Stephen J. Morewitz, Administrator, d.b.n. of the Estate of Constantinos Stamatis, deceased; Stephen J. Morewitz, Administrator, d.b.n. of the Estate of Christos Passalis, deceased; Stephen J. Morewitz, Administrator, d.b.n. of the Estate of George Marangos, deceased; Stephen J. Morewitz, Administrator, d.b.n. of the Estate of Gerassimos Markatos, deceased; Stephen J. Morewitz, Administrator, d.b.n. of the Estate of Moses Egbonim, deceased; Stephen J. Morewitz, Administrator, d.b.n. of the Estate of Mukhtar Ahmed, deceased; Stephen J. Morewitz, Administrator, d.b.n. of the Estate of Augustus Edoro, deceased; Stephen J. Morewitz, Administrator, d.b.n. of the Estate of Afam Esumei, deceased; Stephen J. Morewitz, Administrator, d.b.n. of the Estate of Khalid Sultan, deceased,

Appellees,

v.

General Development and Shipping Enterprises, Co., Ltd.,

Appellant,

and
Imbros Shipping Co., Ltd.; Continental Lines, S.A.; Continental Lines (Armemement), S.A.; Federal Commerce and Navigation (1974) Ltd.; Contramer, S.A.; Neptune International Shipping, Ltd; Neptune International Shipping; Lone Star International, Inc.; Lone Star International, Ltd.; Lone Star Shipping; Lone Star Shipping, Inc.; Quebec Cartier Mining Co., Std.; all foreign corporations or associations, and George A. Tsourinakis, a non-resident, as owners and/or operators of the Cyprus M/V IMBROS; Ryan Stevedoring Corp.; Ryan Walsh Stevedoring Co.; Alabama Wood Treating Corp.; All foreign corporations or associations,

Defendants.

Appeal from the United States District Court for the Eastern District of Virginia, at Newport News. John A. McKenzie, Chief Judge.

Argued April 6, 1981 Decided April 23, 1981

Before WINTER, Chief Judge, RUSSEL, Circuit Judge and ANDERSON, District Judge.

John R. Crumpler, Jr. (Seawell, McCoy, Dalton, Hughes, Gore & Timms on brief) for Appellant;
Burt M. Morewitz (Herbert Lebovici; Thomas M. Breen on brief) for Appellee.

*

Hon. G. Ross Anderson, Jr., United States District Judge for the District of South Carolina, sitting by designation.

PER CURIAM:

Defendant, against whom a number of judgments for wrongful death on the high seas were entered, appeals, contending that the district court erroneously denied its motion to quash service of process and that the district court erroneously denied its motion to decline jurisdiction. We affirm.

From our examination of the record, we are persuaded that the defendant's contacts with the State of Virginia were sufficient to satisfy the requirements of due process of law and the Virginia long-arm statute. We also do not think that the district court abused its discretion in concluding to exercise jurisdiction not-withstanding defendant's claim of form non conveniens. The doctrine of forum non conveniens "presupposes at least two forums in which the defendant is amenable to process." *Gulf Oil Co. v. Gilbert*, 330 U.S. 501, 506-07 (1947). The district court found that no alternative forum was available to some, if not all, of the plaintiffs, and that finding is not clearly erroneous.

AFFIRMED

APPENDIX D

"IMBROS: - FILE REVIEW

23.12.75	Rediadis first contacted and asked to assist GDSE (Managers).
30.12.75	GDSE telex details of crew and owning Company. Further details of crew given on 14.1.76.
21.1.76	WOE instruct Rediadis to advise on crew entitlements. They negotiating Greek crew with GDSE 'our' Representatives will negotiate with others.
20.1.76	Letter from Edward Bata enclosing memorandum and Articles of Association of Imbros Shipping.
25.2.76	Rediadis letter with calculation of 551 comp. Also advised that Lawyer on behalf of Capt. Vasilikakis dependents has approached Rediadis.
5.3.76	Letter WOE to Rediadis and Brokers - acknowledging comp. rights. Also asking Brokers what arrangements Owners are making to put Rediadis and Representatives in funds to deal with loss of life claims.
1.4.76	Advice from H.F. & W. re presumption of loss.

6.4.76 Association refuse write Dependents of Jesus Ramos - suggest to GDSE that this should be done by them.

29.4.76 Rediadis advise on their negotiation with Greek Master.

12.5.76 Association telex Rediadis - agree to settlement of Master's claim and advance funds of Drc. 870,000.

16.7.76 Telex FHM advising that U.S. Attorney has approached Seawells on behalf of Constantinos Stamatis; .....Passalis; George Marangos; Gerasimos Markatos. No suit filed.

16.7.76 Rediadis Advised - told to get on and negotiate.

19.7.76 Telex from GDSE quoting telex from Marine Advisers Bureau Ltd. indicating suit filed by Stamatis, Passalis, Marangos and Markatos.

20.7.76 Rediadis telex reporting negotiation with Tsambasis; Zorbas and Sandalakis. Ask for Drc 1.700.000 to settle all 3.

22.7.76 Club confirms we remitting funds.

14.10.76 Rediadis telex to explain difficulties in settling Tsambasis, Zorbas and Sandalakis claims. Further claims of Constantinos Soursos and Zabir Ahmed.

18.10.76 Club agrees new figure for Tsambasis, Zorbas and Sandalakis of 551 + 25%.

25.10.76 GDSE send letter received from Lawyers Revius O. Oserque acting on behalf of Dependents of Moses Egbonim.

28.10.76 Confirmation from Brokers that Hull Underwriters had settled hull claim - payment made on 20.8.76.

29.1.77 Telex from Rediadis: have settled
KOSTOGLOU
Drc. 330.000 + 10,000 Costs.
SOURSOS Drc. 740,000 + 10,000 Costs.
Drc. 200,000 + 10,000 Costs.

Also action commenced in Greece by parents of John Sandalakis - settlement agreed at Drc. 565,000 + 10,000 costs.

30

25.1.77 Seawells advise motion to squash service on

Imbros Shipping Co.Ltd., granted.

16.2.77 WOE telex Rediadis advising will not advance further funds to settle claims as "substantial" amount call outstanding.

1.3.77 WOE telex Rediadis requesting return of balance of settlement funds in their hands and request Owners provide settlement funds for Sandalakis case.

2.3.77 Rediadis confirm "Owners" informed they must provide settlement funds.

1.7.77 GDSE forward notice of claim from Morewitz office - of claim on behalf Dependent Jesus Ramos Mayorquin.

21.10.77 Telex received from London Brokers, advising calls paid and requesting Club to 'deal with claims.

2.11.77 Club telex to Rediadis, inquiring whether they still in negotiation with Claimants.

2.11.77 Reply from Rediadis. Following our telex 1.3.77 Owners have handled Sandalakis claim. Rediadis will now deal with claim of Tsambasis and Zorbas.

2.11.77	GDSE submit claim on Sandalakis file for Drc. 562,000.
16.11.77	Rediadis telex advising negotiation with Tsambasis and Zorbas.
19.11.77	Letter from Rediadis advising claim of pakistani Seaman Khalid Sultan Mohamed. Recommend settlement Drc 300,000.

5.12.77	Club confirms to Rediadis they remitting Drc.300,000.
7.12.77	Rediadis request Drc 1,384,120 to settle Zorbas and Tsambasis.
12.12.77	Further request from Rediadis.
20.12.77	Funds Drc 1,384,120 sent to Rediadis.
19.1.78	Letter from Freehill's - claim filed in U.S. on behalf Moses Egbonim.
9.3.78	Seawell's advise claims filed in U.S. on behalf Edoro and Esumei.

15.9.78 Freehill's advise us Court upheld jurisdiction against GDSE.

28.9.78 Memo to AHB. Should we withdraw from case?

12.10.78 Letter to Freehill's - calls of $15,000 outstanding - authorizing appeal of decision re jurisdiction on behalf of GDSE. Also enclosing copy of Certificate of Entry for Imbros.

31.10.78 Letter from Freehill's - Court denied jurisdiction appeal. Motion filed to dismiss GDSE on grounds that no duty owed.

15.3.79 Notice sent to GDSE from Club advising them they have never had cover with the Club; that if documents not produced we will serve notice under Rule 26(IV)(v); attention also drawn to Rule 28.

6.4.79 Freehill's send copy motion to relieve Seawells and copy order of Court holding GDSE as Owner pro have vice.

32

-5-

28.4.79 Letter from Rediadis summarizing Greek settlements.

22.5.79	Freehill's telex to say Charterers dismissed from claim.
21.8.79	Letter from Freehill's GDSE held liable for damages to claimants in U.S. on grounds of negligence, unseaworthiness, etc.
21.12.79	Freehill's advise of Leborici's involvement in New York on behalf Claimants.
21.12.79	Telex to Freehill's. Instructed to advise Leborici that Club not involved. GDSE not Member. Also would plead defences under Rules. Authorize offer settlement $50,000.
9.4.80	Freehill's advise Norfolk Court awarded $459,456 against GDSE on behalf of Claimants. PASSALIS, STAMATIS, MARKATORS, MARANGOS, MAYORQUIN, MARTINEZ AND AHMED.
15.4.80	Freehill's write to advise Norfolk Court decision. Also that Crumpler appealing jurisdiction on behalf Owners. Court upheld Greek releases.
13.5.80	Hamilton-Butler alerted to possible action my Morewitz in Alabama.
25.6.80	Letter from Morewitz to the Club suggesting Club "negotiating" behind his back with his

clients.

2.7.80 Telex from Freehill's explaining Crumpler's further involvement in the case.

7.7.80 Another boring letter from Morewitz.

33

-6-

15.8.80 Letter from Freehill's. Court would not allow Crumpler to return. Therefore he acting best he can without instructions.

9.9.80 Leborici looks to negotiate settlement.

4.6.82 Freehill's advise 4th Circuit Appeal Court denied GDSE appeal. Crumpler considering writ of Cert.

5.8.82 Freehill's advise petition for Cert. filed by Seawell's.

22.10.82 Freehill's advise Cert. denied.

26.10.82 Joel Robinson - New York attorney writes to Club. Acting on behalf Dependents and survivor. Claims $600,000 plus.

18.11.82	Reminder letter from Robinson.
6.6.84	Leborici Attempts to serve proceedings on WOE through Freehill's. Service declined.
28.6.85	Freehill's advise action v. WOE commenced in Alabama seeking $459,456.36. by Morewitz. Service anticipated through post.
11.7.85	Advise Freehill's Writ served on WOE.

Supreme Court, U.S.
FILED
JAN 30 1996
CLERK

No. 95-883

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

THE WEST OF ENGLAND SHIP OWNERS
MUTUAL PROTECTION AND INDEMNITY ASSOCIATION
(Luxembourg),
Petitioner,

v.

STEPHEN J. MOREWITZ,
as administrator, etc.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

PETITIONER'S REPLY BRIEF

JOSEPH M. ALLEN, JR.
JOHNSTONE, ADAMS, BAILEY,
GORDON & HARRIS, L.L.C.
Post Office Box 1988
Mobile, Alabama 36633
(334) 432-7682
Counsel of Record for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
I. THE ELEVENTH CIRCUIT'S RULING THAT APPELLATE COURTS MAY REVIEW § 3 STAY ORDERS FAVORING ARBITRATION BEFORE ARBITRATION GOES FORWARD IS IN CONFLICT WITH THE FEDEAL ARBITRATION ACT AND THE TENTH, SEVENTH AND FOURTH CIRCUITS	1
II. RESPONDENT'S ARGUMENT AS TO THE FINDING OF WAIVER MISCHARACTERIZES THE PETITION AND IS UNRESPONSIVE	4
III. RESPONDENT'S ARGUMENT THAT NO CONFLICT EXISTS BETWEEN THE ELEVENTH CIRCUIT AND THE SECOND AND FIFTH CIRCUITS REGARDING FORUM DIRECT ACTION STATUTES IS WITHOUT MERIT	4
CONCLUSION	6

TABLE OF AUTHORITIES

Cases	Page
Adair Bus Sales, Inc. v. Bluebird Corp., 25 F.2d 953 (10th 1994)	3
American Casualty Co. v. L-J. Inc., 35 F.3d 133 (4th Cir. 1994)	1
Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213 (1985)	2
Scherk v. Alberto Culver, 417 U.S. 506 (1974)	2
Sedco, Inc. v. Petroleos Mexicanos Mexican Nat. Oil, 767 F.2d 1140 (5th Cir. 1985)	4
State Establishment for Agric. Prod. Trading v. WESERMUNDE, 838 F.2d 1576 (11th Cir.), *cert. denied*, 48 U.S. 916 (1988)	3
State Trading Corp. v. Assuranceforeningen Skuld, 921 F.2d 409 (2nd Cir. 1990)	5
Stedor v. Armtex, Inc., 947 F.2d 127 (4th Cir. 1991)	2
Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford, Junior Univ., 489 U.S. 468 (1989)	2

Statutes

9 U.S.C. §§ 3, 16	1, 2, 3, 4

Other Materials

Seigel, *Practice Commentary*, 9 U.S.C.A. § 16 (West Supp. 1991)	2

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v.

STEPHEN J. MOREWITZ, as administrator, etc.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITIONER'S REPLY BRIEF

I. THE ELEVENTH CIRCUIT'S RULING THAT APPELLATE COURTS MAY REVIEW § 3 STAY ORDERS FAVORING ARBITRATION BEFORE ARBITRATION GOES FORWARD IS IN CONFLICT WITH THE FEDERAL ARBITRATION ACT AND THE TENTH, SEVENTH AND FOURTH CIRCUITS

The crucial proposition of law embodied in the first question for review is that, in accordance with this Court's mandates that arbitration agreements be enforced as written, " '§ 16 [9 U.S.C.] generally precludes appellate review of orders that favor arbitration over litigation "until after the arbitration has gone forward to a final award." ' " *American Casualty Co. v. L-J, Inc.*, 35 F.3d 133, 135

(4th Cir. 1994) (quoting *Stedor v. Armtex, Inc.*, 947 F.2d 127, 730 (4th Cir. 1991) (quoting Siegel, *Practice Commentary*, 9 U.S.C.A. § 16, at p. 219 (West Supp. 1991))). As demonstrated in our Petition, this is the law of the Fourth, Seventh and Tenth Circuits but not the law of the Eleventh Circuit.

The Eleventh Circuit ruled in this case that under § 3 of the Arbitration Act a party ordered by a district court to arbitrate his dispute may obtain appellate review of that pro-arbitration order without first engaging in the arbitration prescribed by that order. The Tenth, Seventh, and Fourth Circuits hold to the contrary thus creating a conflict among the Circuit Courts of Appeal.

Respondent has failed in his efforts to demonstrate that no conflict among these circuits exists on this important question. Indeed, nowhere does the Respondent address the underlying federal policy favoring the enforcement of arbitration agreements or even attempt to reconcile the Eleventh Circuit's ruling with this policy. In *Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford, Junior Univ.*, this Court explained that the passage of the Act "was motivated, first and foremost, by a Congressional desire to enforce arbitration agreements into which parties had entered." 489 U.S. 467, 478 (1989) (quoting *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 220 (1985)). And in *Scherck v. Alberto Culver*, this Court made it clear that Congress intended to place arbitration agreements "upon the same footing as other contracts." 417 U.S. 506, 511 (1974). As a result, courts are to "rigorously enforce agreements to arbitrate." *Byrd*, 470 U.S. at 221. The Petition, therefore, demonstrates an obvious conflict between the Eleventh Circuit's decision here and the decisions of other circuits which follow the federal policy set forth in the Federal Arbitration Act, a conflict which was nowhere addressed by the Respondent in his brief.

Furthermore, no explanation is offered by the Respondent of how the exercise of appellate review over an order

under § 3 favoring arbitration before arbitration is had is not in conflict with the decisions of the Tenth, Seventh and Fourth Circuits. In *Adair Bus Sales, Inc. v. Bluebird Corp.*, 25 F.3d 953 (10th 1994), for example, the Tenth Circuit was confronted with the precise question which the Eleventh Circuit addressed in this case. The Tenth Circuit in *Adair* concluded that the Arbitration Act prohibited appellate review of a stay order which had been brought to it before arbitration had gone forward. 25 F.3d at 955. The Eleventh Circuit ruled in this case that the Arbitration Act did not prohibit appellate review under these circumstances. This Petition presents an important question of appellate practice under § 16 of the Federal Arbitration Act. This is a question which has never been posed to this Court and over which there is a clear conflict among the circuits. Respondent's argument that the conflict is merely a product of "different facts" is entirely unresponsive and offers nothing to the study of this important issue.

Furthermore, Respondent's treatment of *State Establishment for Agric. Prod. Trading v. WESERMUNDE*, 838 F.2d 1576, 1579 (11th Cir.), *cert. denied*, 48 U.S. 916 (1988) actually highlights the conflict. *State Establishment*, as noted in the Petition, was decided before § 16 was enacted. Nevertheless the Eleventh Circuit, oblivious to § 16, relied on State Establishment in its exercise of appellate review over the arbitration order before the ordered arbitration was had, notwithstanding that the forgotten section of the Act prohibited review under these circumstances. Section 16 of the Act provides that there is no appeal from a § 3 order favoring arbitration. Section 3 provides that a trial court "shall . . . stay the trial of the action *until such arbitration has been had* in accordance with the terms of the agreement . . . ." (Emphasis added). The Tenth, Seventh and Fourth Circuits have relied on these sections in arriving at a conclusion in conflict with that of the Eleventh Circuit. The fact that the Eleventh Circuit relied on *State Establish-*

ment, rather than on §§ 3 and 16 of the Act, frames the existing conflict so obviously in need of resolution by this Court.

II. RESPONDENT'S ARGUMENT AS TO THE FINDING OF WAIVER MISCHARACTERIZES THE PETITION AND IS UNRESPONSIVE

Respondent has also failed to show how the Eleventh Circuit's opinion in this case—that there was waiver of a right to arbitration by Petitioner by reason of acts done (or not done) six years before this suit was instituted—is not in conflict with the law of other circuits. Again, the Respondent has not even attempted to reconcile the pre-litigation waiver rule of the Eleventh Circuit with the overriding policy of the Arbitration Act.

Of particular note is the absence of any discussion of *Sedco, Inc. v. Petroleos Mexicanos Mexican Nat. Oil*, 767 F.2d 1140 (5th Cir. 1985) in Respondent's opposition. With essentially identical facts, the Fifth Circuit in *Sedco, Inc.* arrived at an altogether contrary conclusion. Again, there is a conflict among the circuits which cannot be explained away by Respondent's declaring "different facts."

III. RESPONDENT'S ARGUMENT THAT NO CONFLICT EXISTS BETWEEN THE ELEVENTH CIRCUIT AND THE SECOND AND FIFTH CIRCUITS REGARDING FORUM DIRECT ACTION STATUTES IS WITHOUT MERIT

The final question presented for review in the Petition is a wholly legal one: Are forum direct action statutes to be applied automatically by federal courts in admiralty actions without regard to choice of law analysis? The Eleventh Circuit answered in the affirmative. The Second and Fifth Circuits answered in the negative.

There is nothing in Respondent's opposition which illustrates an absence of conflict on this important question.

Indeed, the Respondent simply ignores that the Second Circuit in *State Trading Corp. v. Assuranceforeningen Skuld* stated expressly that it was in conflict with the Eleventh Circuit over this question. 921 F.2d 409, 415 (2d Cir. 1990).

District courts in the Eleventh Circuit will now apply forum direct action statutes automatically and without regard to choice of law rules. District courts in the Second and Fifth Circuits will not. The Respondent has not demonstrated otherwise.

Notwithstanding his position that Alabama's direct action statutes were properly applied as forum procedural devices, Respondent notes forum contacts which purportedly otherwise support the result of the Eleventh Circuit ruling. Respondent asserts various negligent acts which are supposed to have occurred in Mobile. (Respondent's brief, p. 25). But the suit for liability for negligence proceeded to judgment in the Eastern District of Virginia over 15 years ago and what was done or not done in Mobile is wholly irrelevant to the question of what law should govern the terms of the contract. Thus the instant suit has nothing at all to do with negligence or unseaworthiness of the vessel. Rather, it is, as the Respondent has repeatedly argued, a suit on a marine insurance contract. (App. F, 36a). None of the contacts noted by Respondent are relevant to the formation or execution of the subject contract. The contract on which this suit is based was issued by a Luxembourg corporation through London agents to a Cypriot corporation on a Cypriot-flagged vessel and requires arbitration in England and application of English law. As the Respondent has conceded, "the reason the action was filed in [Alabama] rather than in [Virginia], is that Virginia's long-arm statute affords the plaintiff no relief; whereas, Alabama's long-arm statute is much broader than that of Virginia." (App. G, 55a n.2).

CONCLUSION

Respondent's opposition is unresponsive and belies the conflicts created by the Eleventh Circuit's decision. The questions presented in the Petition involve conflicts concerning crucial aspects of the Federal Arbitration Act and the overriding federal policy it is intended to affect, and uniformity of the admiralty law. The Petition should be granted for the reasons set forth therein.

Respectfully submitted,

JOSEPH M. ALLEN, JR.
JOHNSTONE, ADAMS, BAILEY,
GORDON & HARRIS, L.L.C.
Post Office Box 1988
Mobile, Alabama 36633
(334) 432-7682
Counsel of Record for Petitioner